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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 82

THE UNITED STATES OF AMERICA, APPELLANT

v.

F. W. DARBY LUMBER COMPANY AND FRED W. DARBY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court below (R. 16) is reported in 32 F. Supp. 734.

JURISDICTION

The judgment below was entered May 6, 1940 (R. 21). The order allowing appeal was filed May 13 (R. 22) and probable jurisdiction noted June 3, 1940. The jurisdiction of this Court is based upon the Criminal Appeals Act (U. S. C., Title 18, Sec. 682) and Section 238 of the Judicial Code as amended (U. S. C., Title 28, Sec. 345).

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QUESTIONS PRESENTED

1. Whether Congress has constitutional power: (a) to prohibit the shipment in interstate commerce of lumber produced under specified substandard labor conditions; and (b) to prescribe minimum rates of pay and maximum hours of work for employees engaged in the production of lumber for interstate commerce.

2. Whether the provisions of the Fair Labor Standards Act as applied to the appellee violate the due process clause of the Fifth Amendment.[1]

STATUTE INVOLVED

The statute involved is the Fair Labor Standards Act of 1938, 52 Stat. 1060, U. S. C., Title 29, Sec. 201 *et seq.* The Act and the applicable Regulations are set forth in Appendix A, *infra,* p. 119. For the convenience of the Court the salient provisions of the Act pertinent here are briefly summarized.

Section 6 provides that every employer shall pay to each of his employees who is engaged in interstate commerce, or in the production of goods for that commerce, a wage of not less than twenty-five cents an hour during the first year after the effective date of the section. Section 7 provides that during the same year those employees shall not be

[1] This question, though not passed upon by the lower court, was raised by appellee in its demurrer and seems properly to be before this Court. See *infra,* p. 99.

employed for longer than forty-four hours per week without receiving compensation at one and one-half times the regular rate of pay for hours in excess of forty-four. The minimum wage and the maximum hours are to be gradually increased and decreased, respectively, after the first year.

Section 11 (c) requires employers subject to the Act to keep such records of the wages and hours of their employees as are prescribed by administrative regulation.

Section 15 provides that it shall be unlawful for any person (1) to transport or sell in interstate commerce, or sell with knowledge that shipment in interstate commerce is intended, goods in the production of which the wage or hour standards of the Act have been violated; (2) to violate any of the provisions of Sections 6 or 7, which establish such standards; or (3) to violate the provisions of Section 11 (c).

STATEMENT

The appellee was indicted on November 2, 1939, for the violation of various provisions of the Fair Labor Standards Act. The indictment contains nineteen counts (R. 1–14).

Paragraphs 1 to 8 of the first count (R. 1–2) are incorporated by reference in each succeeding count. These paragraphs allege that the F. W. Darby Lumber Company, of Statesboro, Georgia, is an unincorporated company owned by and under the

active control of Fred W. Darby[1] (Pars. 1 and 2). The company and Darby are engaged in the business of buying, producing, manufacturing, and selling lumber. In the course of the business they receive orders for lumber, obtain the raw material (by purchase or cutting), convert it by various processes into manufactured lumber, and sell it (Par. 3). A large proportion of defendant's lumber was bought, produced, and manufactured pursuant to orders received from customers outside of Georgia with the intent on defendant's part that after obtaining and manufacturing the lumber it would be sold, shipped, transported, and delivered to points outside the State of Georgia; thus "the defendant produced and transported goods for interstate commerce within the meaning of the Fair Labor Standards Act of 1938" (Par. 4).

It is further alleged that Darby and his employees were employer and employees, respectively, within the meaning of the Fair Labor Standards Act (Pars. 5 and 6), and that at all times referred to in the indictment a large proportion of the employees were engaged in the production and manufacture of lumber for interstate commerce (Par. 7).

Count 1 of the indictment charges, in Paragraph 9, that during the week beginning March 3, 1939, defendant Darby employed one Levy Weaver "in

[1] Fred W. Darby is the only defendant. The Darby Lumber Company was not made a defendant although it was named in the caption of the indictment.

the buying, procuring, obtaining, producing, and manufacturing of goods, to wit, lumber, for interstate commerce," and failed to pay him the prescribed minimum wage of twenty-five cents per hour for that period (R. 3). Counts 2 and 3 are identical, except for the name of the employee and the period of time covered (R. 3–4). Counts 4 to 11 differ from the above only in that they charge that during specified weeks defendant failed to pay named employees one and one-half times the regular rate of pay for hours worked in excess of forty-four per week (R. 4–9).

Count 12, Paragraph 2, avers that the Administrator of the Wage and Hour Division of the United States Department of Labor, pursuant to the provisions of Section 11 (c) of the Act, issued regulations, described as Title 29, Chapter V, Code of Federal Regulations, Part 516, requiring every employer subject to the Act to keep records showing the hours worked each day and week by each of his employees. Paragraph 3 then charges that the defendant unlawfully failed to keep such records for his employees, including employees engaged "in the production and manufacture of goods, to wit, lumber, for interstate commerce" (R. 10).

Count 13 alleges that on or about March 7, 1939, defendant transported, shipped, and delivered from a point in Georgia to Gainesville, Florida, an identified shipment of lumber "which the defendant had cut and produced by Daniel P. Gay, knowing that in the cutting and production * * *,

Gay intended the said lumber would be shipped in interstate and foreign commerce, and that Daniel B. Gay employed in the production of said lumber, employees, within the meaning of the Fair Labor Standards Act, to whom he failed to pay wages at a rate not less than twenty-five cents (25¢) an hour" (R. 11). Counts 14 to 16 make the same allegations with respect to shipments of lumber to New York City, Orangeburg, South Carolina, and Toledo, Ohio (R. 11–12).

Count 17 alleges that on or about March 7, 1939, the defendant transported, shipped, and delivered from a point within the State of Georgia to a point within the State of Florida identified lumber "manufactured and produced for interstate commerce, in the production and manufacture of which the defendant had employed employees to whom the defendant had failed to pay wages at a rate not less than twenty-five (25¢) an hour" (R. 13). Count 19 contains a similar charge with respect to a shipment to the State of Ohio (R. 14). Count 18 is also the same as Count 17, except that it alleges that defendant shipped lumber in interstate commerce in the production of which he had employed employees in excess of forty-four hours per week without paying them time and a half for hours in excess of forty-four (R. 13).

On February 16, 1939, appellee filed a demurrer to the indictment (R. 14–16), asserting that the Act was unconstitutional because it did not fall within any of the powers granted to Congress in

Article I, Section 8, of the Constitution and because it violated the Fifth, Sixth, and Tenth Amendments.[2] The demurrer also alleged that the indictment did not set forth facts showing a violation of any valid statute of the United States, that it failed to advise defendant of the nature of the charge against him, that it failed to charge that the "manufacture, production, or sale of lumber is trade or commerce among the several States or constitutes interstate commerce", and that in certain details the indictment was not sufficiently definite.

The demurrer was argued on February 16, 1940, and on April 27 the District Court rendered an opinion sustaining the demurrer and quashing the indictment (R. 16–20). The opinion considers only the question of interstate commerce, and concludes that application of the Act to the facts alleged in the indictment is unconstitutional. The essence of the opinion seems to be the following passage (R. 19):

> * * * The essential constitutional question in reference to the interstate commerce clause is as to the meaning of the language of the Act, Sec. 6:
>
> "Every employer shall pay to each of his employees who is engaged in commerce or

[2] In the court below appellee abandoned a claim under the Eighth Amendment. Appellee also conceded that in view of a stipulation of counsel Paragraph 7 of his demurrer, which attacked the validity of Section 3 (m) of the Act, need not be considered.

in the *production of goods for commerce* wages at the following rates" [italics ours].

If the language "in the production of goods for commerce" be limited to production which at the time of production was directly connected with interstate commerce or was coupled with some act or acts pertaining to and making such production a part of interstate commerce the Act is constitutional; but if the Act means, as this indictment charges, that the mere intent at the time of production that after production it may or will be sold in interstate commerce in part or in whole makes it a part of interstate commerce, the Act is unconstitutional. * * *

SUMMARY OF ARGUMENT

I

The Fair Labor Standards Act is a valid exercise of the commerce power of Congress. This conclusion is required both by the character of the economic problem, as measured against the broad purpose of the commerce clause, and by the decisions of this Court which sanction the particular provisions of the Act here attacked.

A

1. State legislators, Congressional committees, federal commissions, and businessmen over a long period of time have realized that no state, acting alone, could require labor standards substantially

higher than those obtaining in other states whose producers and manufacturers competed in the interstate market.

2. The reiterated conclusion that the individual states were helpless gained added force during the prolonged economic depression of the 1930's. The Thirty-Hour Week bills, the National Industrial Recovery Act, the textile and the coal bills, and the Fair Labor Standards Act itself each reflect a great volume of testimony adduced at congressional hearings and elsewhere to the effect that employers with lower labor standards possess an unfair advantage in interstate competition, and that only the national government could deal with the problem. The lumber industry itself affords a dramatic illustration of the inability of the particular states to insure adequate labor standards; over 57 percent of the lumber produced enters into interstate or foreign commerce from 45 of the states.

3. The Congressional committees made specific findings which were embodied in the Fair Labor Standards Act as the congressional judgment that low labor standards were detrimental to the health and efficiency of workers, caused the channels of interstate commerce to spread those labor conditions among the states, burdened interstate commerce, led to labor disputes obstructing that commerce, and constituted an unfair method of competition. Particularly when these findings accord with the facts of which this Court has already

taken judicial notice, they are to be given conclusive weight.

4. The incapacity of the individual states to remedy the serious evils resulting from long hours and low wages in interstate industry rests in part upon the commerce clause itself, which prevents the states from forbidding importation of goods produced under substandard conditions. *Baldwin* v. *Seelig,* 294 U. S. 511. And, even if a state could constitutionally protect its industries within its own borders, it could not safeguard them against the loss of their markets in other states.

B

The commerce clause was designed to empower the national government to deal with such problems.

1. The Virginia Resolution, directing that the national government be empowered "to legislate in all cases to which the separate states are incompetent," was three times approved by the Federal Convention, and indeed, was amplified to authorize Congress "to legislate in all cases for the general interests of the union." The Committee of Detail translated these broad principles into the enumerated powers. The failure of the Convention to object to this change in structure can reasonably be interpreted only to mean that the Convention understood that the enumerated powers, including the commerce clause, placed within the jurisdiction

of the national government control over those problems which are national in scope.

2. Examination of the expression "commerce among the several states" in the light of the etymology of 1787 shows that the phrase at that time had a meaning equivalent to "the interrelated business transactions of the several states." Lexicographers, economists, and authors used the term "commerce" to refer not only to the narrow concept of sale or exchange, but to include the entire moneyed economy, embracing production and manufacture as well as exchange. Moreover, the men who met in Philadelphia did not create an instrument fitted to cope only with the exigencies of their time; they realized that the Constitution must apply in a "remote futurity," bringing "contingencies * * * illimitable in their nature," and desired that it be capable of achieving in the future the great purposes set out in the Sixth Resolution and carried over into the Preamble.

3. The decisions of this Court, from their very beginning, have recognized that the commerce clause gives Congress power to meet the economic problems of the nation, whatever they may be. Marshall's basic criterion has never been bettered: Congress has power over "that commerce which concerns more states than one," including "those internal concerns which affect the states generally," in contrast to "the completely internal commerce of a state." *Gibbons* v. *Ogden,* 9 Wheat. 1,

the committee described in vivid terms the degrading and deleterious effects of low labor standards and concluded "that so long as interstate commerce in this regard is left free, the stamping out of the sweating system in any particular State is practically of no effect, except to impose peculiar hardship upon the manufacturers of that State."[8] Exercise of "the full jurisdiction of the Federal Government over interstate commerce" was recommended.[9]

The report of the U. S. Industrial Commission in 1901 declared:[10]

> Uniform, or at least similar, legislation in the various States is especially desirable in the case of laws restricting child labor, because insofar as the employment of children is a real economy, it gives manufacturers in the States where it is permitted an unfair advantage over those in the States having child-labor laws.

In 1907 the evils caused by the labor of women and children were deemed a sufficiently serious national problem for Congress to authorize another investi-

[8] House Rept. No. 2309, 52d Cong. 2d Sess., Report of the Committee on Manufacturers on the Sweating System (1893), p. XXIV.

[9] *Id.*, at XXI.

[10] H. Doc. 380, 57th Cong., 1st Sess., Report of the U. S. Industrial Commission on *Regulations and Conditions of Capital and Labor* (1901), Vol. XIX, p. 922.

gation; this resulted in a nineteen-volume report in 1910 and 1911.[11]

Recognition of the inability of the individual states to cope with the problem of child labor resulted in the passage of the Child Labor Act of September 1, 1916 (39 Stat. 675), which was later declared invalid by a closely divided Court. *Hammer* v. *Dagenhart,* 247 U. S. 251. In the hearings and debates preceding the passage of that law, witnesses and congressmen reiterated that every attempt by a state legislature to protect children was "met by the cry from the manufacturers, 'State legislation is unfair. You ask us to compete with other States of different standards. This interstate competition will ruin our business. If we must advance, let us advance together.'"[12] The Senate Committee Report in favor of the Child Labor Bill stated:[13]

> So long as there is a single State which for selfish or other reasons fails to enact effec-

[11] 34 Stat. 866; S. Doc. No. 645, 61st Cong., 2d Sess., *Report on Condition of Women and Child Wage Earners in the United States.*

[12] Hearings before the House Committee on Labor, 64th Cong., 1st Sess., on H. R. 8234, p. 270. See also H. Rept. No. 46, 64th Cong., 1st Sess., p. 13, 53 Cong. Rec. 1571, 1575, 2014, 2029–2039, 12208, Appendix, Pt. 14, pp. 206, 212, 239, 245, 257, Pt. 15, p. 1807. And see the memorials presented by Massachusetts (45 Cong. Rec. 5245) and Ohio (53 Cong. Rec. 1002). The material on this point is collected in the brief for the Government in *Hammer* v. *Dagenhart,* October Term, 1917, No. 704, pp. 10–35.

[13] S. Rept. No. 358, 64th Cong., 1st Sess., p. 21.

194–195. See, also, *Minnesota Rate Cases*, 230 U. S. 352, 398. Under the protection of this clause, and the decisions of this Court, our markets have become national rather than local. Labor conditions, so far from being the concern of the individual states alone, can now adequately be regulated only by Congress. The commerce clause, in incapacitating the states, gives the requisite power to Congress.

C

1. Section 15 (a) (1) forbids the interstate shipment of goods produced under substandard labor conditions. The provision is on its face a regulation of interstate commerce, and therefore within the powers of Congress. *Mulford* v. *Smith*, 307 U. S. 38; *Electric Bond and Share Co.* v. *Commission*, 303 U. S. 419, 442; *Kentucky Whip & Collar Co.* v. *Illinois Central R. Co.*, 299 U. S. 334, 347.

None of the objections advanced to this obvious conclusion have substance; we shall consider each in turn.

2. It can no longer be asserted that the power of Congress to restrict or condition interstate commerce is limited to articles in themselves harmful or deleterious. *Mulford* v. *Smith, supra; Kentucky Whip & Collar Co.* v. *Illinois Central R. Co., supra.*

3. The suggestion that Congress cannot regulate interstate commerce for ends which do not concern commerce itself is also unavailing. The Fair La-

bor Standards Act, intended to prevent unfair competition and the spread of harmful conditions in interstate commerce, has a goal which is commercial in the strictest sense. But, even if the Act were concerned simply with humanitarian ends, it would none the less be within the commerce power.

4. The argument that Section 15 (a) (1) is an invalid regulation of production because it will affect the manner in which goods are produced is destroyed by the decision in *Mulford* v. *Smith, supra,* where the Court sustained the power of Congress to regulate the amount of tobacco marketed, despite the obvious effect of the regulation upon the amount produced on the farm. The power of Congress is measured by what it regulates, not by what it affects.

5. *Hammer* v. *Dagenhart,* 247 U. S. 251, is wholly inconsistent with the subsequent decisions of this Court, which have repudiated or abandoned each premise upon which the opinion rests.

If it were to be reaffirmed, there again would appear a "no man's land" in which both the states and Congress are incompetent to act; the Constitution contemplates no such result.

D

Section 15 (a) (2) forbids violation of the provisions which fix wages and hours to be observed in the production of goods for interstate commerce. It is valid under any of several analyses.

1. Section 15 (a) (2) is an appropriate means by which to keep the interstate channels free of goods produced under substandard conditions. The direct prohibition of interstate shipment found in Section 15 (a) (1) is implemented and enforced by the provisions of Section 15 (a) (2), which prohibit such conditions in the production of goods for interstate commerce. It is familiar doctrine that intrastate acts lie within the power of Congress when necessary effectively to control interstate transactions, and Congress need not wait until transportation commences in its effort to protect the flow of commerce. *Shreveport Case,* 234 U. S. 342.

2. Again, even if Section 15 (a) (2) were entirely independent of Section 15 (a) (1), it would constitute a valid control over unfair competition in interstate commerce. Employers who exploit substandard labor conditions gain an unfair advantage which diverts interstate trade to them at the expense of their competitors. Congress may regulate methods of competition in interstate commerce regardless of the intrastate situs of the transactions giving the competitive advantage.

3. The simplest answer to appellee's attack is that Section 15 (a) (2) deals with employer-employee relationships which have already been established by the Labor Board cases as within the federal commerce power. *Santa Cruz Fruit Packing Co.* v. *National Labor Relations Board,* 303 U. S. 453.

4. Moreover, the Labor Board cases are controlling because Congress has found that Section 15 (a) (2) will diminish the obstructions to interstate commerce which flow from labor disputes. The most frequent occasions for disruptive strikes, as indicated both by official investigations and by the decisions of this Court, are the conditions caused by low wages and long hours. If Congress can forbid one important cause of labor disputes which obstruct commerce, the refusal of employers to accept collective bargaining, it has corresponding power to correct substandard labor conditions, the other major cause of obstructive labor disputes.

5. Neither *Schechter Poultry Corp.* v. *United States,* 295 U. S. 495, nor *Carter* v. *Carter Coal Co.,* 298 U. S. 238, is controlling here. The *Schechter* case applied only to local activities after interstate commerce had ended. The *Carter Coal* case is wholly inconsistent with the subsequent decisions of this Court, in particular *Santa Cruz Fruit Packing Co.* v. *National Labor Relations Board,* 303 U. S. 453, and should now be overruled.

E

Sections 11 (c) and 15 (a) (5), requiring employers to keep records and forbidding them to make false reports, are plainly ancillary to the regulatory sections of the Act and their constitutionality inevitably follows that of the substantive provisions.

II

Since the Fair Labor Standards Act is a valid exercise of the power granted Congress to regulate interstate commerce, there is no room for the Tenth Amendment to operate. That amendment in terms merely reserves to the States "the powers not delegated to the United States."

1. That the Amendment is not a limitation upon the exercise of the powers which are delegated to the federal government is confirmed by the history of its adoption. Its purpose, as then expressed, was merely to declare that the central government was to be one of delegated powers; it was viewed as unnecessary, but it was considered that "there can be no harm in making such a declaration."

2. The plain purpose of the Amendment has been recognized by more than a century of constitutional litigation. From *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 325, to *Wright* v. *Union Central Life Ins. Co.*, 304 U. S. 502, 516, the Court has repeatedly recognized that the Tenth Amendment adds nothing to the Constitution. A few of the relatively recent decisions of this Court suggesting a contrary view cannot be taken to have overruled *sub silentio* so important a constitutional doctrine.

III

The Fair Labor Standards Act does not violate the Fifth Amendment.

A

The question of due process is properly before this Court. *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 330; cf. *United States* v. *Borden Co.*, 308 U. S. 188, 207.

B

The Fair Labor Standards Act does not unduly limit liberty of contract. The decisions sustaining the power of the states to enact comparable legislation are fully applicable under the Fifth Amendment. This Court has sustained legislation fixing maximum hours for both men and women, and minimum wages for women generally and for men under certain circumstances. The only remaining question, that of a statute providing for minimum wages for men generally, is clearly governed by the other decisions. As the Court recognized in the *West Coast Hotel Co.* case, the legislature must be competent to prevent the injuries to health and general welfare which flow from low wages as well as from long hours. Facts of common knowledge, together with technical and statistical studies in great volume, all show that the health and welfare of both the worker and the nation depend upon the elimination of substandard conditions.

C

Appellee's objection that the Act is arbitrary because it establishes a uniform minimum standard

for the entire nation could be sustained only if it could be proved that the amount selected was so high that no rational person could regard it as suitable. The minimum wage of 25 cents an hour during the first year and 30 cents during the six subsequent years is obviously not unreasonably high. It is less than the wages fixed by minimum-wage boards and less than the estimates of the minimum amounts necessary for subsistence, whatever region of the country be selected.

D

The exemption, in Section 13 (a) (6), of an employee engaged in agriculture can no longer be thought to make the statute unconstitutional. *Tigner* v. *Texas,* 310 U. S. 141. The particular complaint that the producers of naval stores are exempt while lumber manufacturers, who also work on pine trees, are subject to the Act ignores the substantial testimony before Congress that the production of gum naval stores is an agricultural operation while lumber production is not.

E

The objection that the Fair Labor Standards Act is void because of its indefiniteness is without merit.

ARGUMENT

The constitutionality of the Fair Labor Standards Act has been passed upon by one circuit court

of appeals[1] and by eight district judges.[2] Except in the instant case, the Act has uniformly been held to be valid.

I

The Fair Labor Standards Act Is a Valid Exercise of the Commerce Powers of Congress

To assay the constitutionality of the Fair Labor Standards Act it is desirable, in the first instance, to refer to the nature of the economic problems with which the Act deals and to explain the significance of those problems in terms of constitutional history. Accordingly, this brief first will show that, as a practical matter, labor conditions under which goods are produced for interstate sale create

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[1] *Opp Cotton Mills* v. *Administrator*, 111 F. (2d) 23 (C. C. A. 5th), certiorari pending, No. 330. The Act has also been given effect by the Circuit Court of Appeals for the Seventh Circuit in *Fleming* v. *Montgomery Ward & Co.*, decided July 18, 1940, certiorari pending, No. 407, and by the Circuit Court of Appeals for the Eighth Circuit in *Fleming* v. *Hawkeye Pearl Button Co.*, 113 F. (2d) 52.

[2] *United States* v. *Walters Lumber Company*, 32 F. Supp. 65 (S. D. Fla.); *Jacobs* v. *Peavy-Wilson Lumber Co.*, 33 F. Supp. 206 (W. D. La.); *Andrews* v. *Montgomery Ward & Co.*, 30 F. Supp. 380 (N. D. Ill., Holly, J.); affirmed, July 18, 1940; *United States* v. *Feature Frocks, Inc.*, 33 F. Supp. 206 (N. D. Ill., Woodward, J.); *United States* v. *Chicago Macaroni Co.*, Dec. 4, 1939 (N. D. Ill., Barnes, J.); *Williams* v. *Atlantic Coast Line Railroad*, Feb. 20, 1940 (E. D. N. C.); *Morgan* v. *Atlantic Coast Line Railroad*, 32 F. Supp. 617 (S. D. Ga.); *Bowie* v. *Claiborne*, Dec. 26, 1939 (D. C. Puerto Rico); *Quinones* v. *Central Igualdad, Inc.*, Feb. 7, 1940 (D. C. Puerto Rico); *Honore* v. *Porto Rican Express Co., Inc.*, April 1, 1940 (D. C. Puerto Rico); cf. *Rogers* v. *Glazer*, 32 F. Supp. 990 (W. D. Mo.). The first two of the above cases dealt with the lumber industry.

a commercial and economic problem which the states cannot solve. The history of the commerce clause shows that such problems were intended to fall within the scope of the powers granted to Congress. The brief will then deal with the specific provisions of the statute under attack and show that those provisions lie well within the powers of Congress as defined by the decisions of this Court.

A. THE DISTRIBUTION IN INTERSTATE COMMERCE OF GOODS PRODUCED UNDER SUBSTANDARD LABOR CONDITIONS CREATES A NATIONAL COMMERCIAL PROBLEM, WHICH THE INDIVIDUAL STATES CANNOT SOLVE.

1. *The Background.*—The interstate labor problem, although increasing in intensity in recent years, is almost as old as interstate competition. As early as 1838 witnesses before a Pennsylvania investigating committee "expressed their fear that any reduction of the hours of labor, or the prohibition of child labor, so long as it could apply only to Pennsylvania, must result disastrously to manufacturers in their competition with others not similarly restricted."[1] A Massachusetts legislative investigation in 1845,[2] and a Pennsylvania

[1] "*Factory Legislation in Pennsylvania: Its History and Administration*," by J. L. Barnard, Publications, Univ. Pa., Series in Pol. Econ. and Pub. Law, No. 19 (1907), p. 14.

[2] United States Department of Labor, Women's Bureau Bulletin No. 66–1, *History of Labor Legislation for Women in Three States* (1929), p. 14 (taken from Massachusetts legislative documents, House No. 50, 1845). The investigation was directed at a proposal for a ten-hour day for women.

urers' resolution in 1848,[3] made the same
gain, in the 1370's ten-hour bills were de-
Massachusetts; they were opposed on the
at "they would drive the best operatives
other state where they could work as
rs as they pleased."[4] By 1890 the sixty-
k had become generally established in
setts, but a fifty-eight-hour week in the
dustry was opposed because[5] "Massa-
* * * was just recovering from the
ages of having to compete with neighbor-
that had labor standards lower than hers,
extile industry could not afford the set-
nother reduction of hours which would
t, competitors; * * *." After the
-hour law was passed, representatives of
urged that it placed a "special hardship"
ufacturers in Massachusetts because of
npetitors in other states," and that uni-
lation on a national basis was essential.[6]
ie Secretary of the National Association
Manufacturers made a similar complaint
mendation.[7]

Congress ordered an investigation of the
system (27 Stat. 399). The report of

Commons and Associates, *Documentary History*
Industrial Society (1910), Vol. VIII, p. 202.
Bureau Bulletin No. 66-1, *supra*, note 2, p. 18.
Bureau Bulletin No. 66, pp. 29–30.

tive child-labor legislation, it is beyond the power of every other State to protect effectively its own producers and manufacturers against what may be considered unfair competition of the producers and manufacturers of that State, or to protect its consumers against unwittingly patronizing those who exploit the childhood of the country.

The effect of low labor standards upon competition in interstate commerce was illustrated by the diversion of business to states where manufacturers were free to treat their employees the least favorably. Production of shoes in Massachusetts decreased tremendously because of the advantages in competition possessed by establishments in Maine, New Hampshire, and midwestern states with lower labor standards.[14] A similar diversion of trade occurred in the clothing industry from factories in

[14] With respect to the migration of the shoe industry from its established center in Massachusetts and also from large cities in Wisconsin to areas of lower wages, see State of Massachusetts, Governor's Committee on the Shoe Industry, Report by Gleason L. Archer, April 11, 1935; Preliminary Report of the Secretary of Labor, pursuant to Senate Resolution 298, 74th Cong. (1938), *Migration of Workers;* Massachusetts House Doc. No. 2045, Preliminary Report to the General Court of the Commission on Interstate Cooperation, *Concerning the Migration of Industrial Establishments from Massachusetts*, under Chap. 10, Resolutions of 1938; Robert Malcolm Keir, *Manufacturing* (1928); National Recovery Administration, Hearings on Boot and Shoe Industry, *Study on the Causes of Migration from the State of Massachusetts*, January 22, 1935, pp. 297, 316–326, 344, 347, 348–352, 418–449, 452–453.

New York City to small towns in Pennsylvania, New Jersey, Connecticut, and the South where labor standards were lower.[15] And the diversion of trade in the textile industry from the North to the South is of common knowledge.[16]

2. *1930–1937.*—The prolonged economic depression of the 1930's produced a much more insistent demand for federal legislation fixing labor stand-

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[15] State of Connecticut Legislative Doc. No. 23, *Report of the Department of Labor on the Business and Conditions of Wage Earners in the State* (1933); United States Department of Labor, Women's Bureau, *The Employment of Women in the Sewing Trades of Connecticut* (*1935*), pp. 15–16; United States Department of Labor, Bureau of Labor Statistics, *Labor in the Shirt Industry*, 1933, Monthly Labor Review, September 1933, p. 499; Thomas L. Stokes, *Carpet Baggers of Industry*, 1937; United States Department of Labor, Wage and Hour Division: *Hearings before Subcommittee of Apparel Industry Committee*, pp. 56–57, 62, 63; Supplement to Meeting of Apparel Industry Committee, 1939, Vol. II, pp. 102–104, 117, 133, 134–138.

[16] B. & G. S. Mitchell, *The Industrial Revolution in the South* (1930); B. & G. S. Mitchell, "*The Plight of the Cotton Mill Labor*," in American Labor Dynamics, edited by J. B. S. Hardman (1928), Chap. XVIII; S. Doc. 126, 74th Cong., 1st Sess., *A Report on the Conditions and Problems of the Cotton Textile Industry*, made by the Cabinet Committee appointed by the President of the United States (August 21, 1935), pp. 46–47; Massachusetts House Doc. 2045, *supra*, note 14, pp. 11–18; Robert Malcolm Keir, *Labor's Search for More* (1938), pp. 455, 456; United States House of Representatives, Subcommittee of the Committee on Labor, 74th Cong., 2nd Sess., Hearings on H. R. 9072, to *Rehabilitate and Stabilize Labor Conditions in the Textile Industry in the United States;* Carter, Goodrich, and others, *Migration and Economic Opportunity* (1936).

ards. The familiar and vicious spiral set in by which prices were cut to obtain a market; to meet the lower prices, labor costs were cut by reducing wages and prolonging hours; the competitive advantage thus obtained vanished as other producers did the same; and the whole process was repeated once again. The resulting loss in purchasing power of the workers led to widespread unemployment, which in turn forced the worker to accept any amount offered. In the lumber industry, for example, the average wages for unskilled laborers in Georgia dropped from $9.71 in 1928 [17] to $3.76 per week in 1932.[18] By 1932 the average wage for the laborers in Georgia was 9.4 cents per hour.[19]

The hearings before congressional committees held in connection with the proposed thirty-hour-week bills,[20] the National Industrial Recovery Act (48 Stat. 195), the Ellenbogen Bill for the regulation of the textile industry,[21] the first Guffey Coal Act (49 Stat. 991), and the Fair Labor Standards Act itself, are replete with statements as to the un-

[17] United States Department of Labor, Bureau of Labor Statistics, Bulletin No. 497, *Wages and Hours of Labor in the Lumber Industry: 1928*, p. 35.

[18] *Id.*, Bulletin No. 586 (1932), p. 32.

[19] *Ibid.*

[20] H. R. 14518, 72d Cong., 2d Sess.; H. R. 4557, 73d Cong., 1st Sess.; H. R. 8492, 73d Cong., 2d Sess.; H. R. 7198, 74th Cong., 1st Sess.; see H. Repts.: No. 1999, 72d Cong., 2d Sess.; No. 24, 73d Cong., 1st Sess.; No. 889, 73d Cong., 2d Sess.; No. 1550, 74th Cong., 1st Sess.

[21] H. R. 9072, 11770, 12285, 74th Cong., 2d Sess.; H. Rept. No. 2590, 74th Cong., 2d Sess.; H. R. 238, 75th Cong., 1st Sess.

fair competitive advantage accruing to the employers with lower labor standards, the interstate nature of the competition, the consequent lack of capacity of the states to remedy the situation, and the necessity for federal action.

In December 1932 the thirty-hour-week bill was first introduced in the 72nd Congress, 2nd Session, and favorably reported.[22] The bill was reintroduced in the 73rd Congress, 1st Session, and hearings were held. The statement of the representative of the clothing manufacturers of Rochester, New York, is typical of the many remarks [23] urging the necessity of federal labor legislation. He stated that:[24]

> Today the manufacturers with the longest hours and lowest wages set a standard which the whole industry must try to meet if it is to get its share of the nation's business.
>
> * * * * *
>
> The establishment of a national minimum wage rate and standard of hours is the only effective method of combating this tendency in business today.

The thirty-hour-week bill passed the Senate on April 6, 1933.[25] The bill never came to a vote in

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[22] S. 5267, H. R. 14082, 14105, 14518, H. Rept. No. 1999, 72d Cong., 2d Sess.

[23] See Note 45, *infra*, p. 34.

[24] Hearings, House Committee on Labor, 73d Cong., 1st Sess., on S. 158 and H. R. 4557, *Thirty-hour Week Bill*, pp. 825–826.

[25] 77 Cong. Rec. 1350.

the House, although favorably reported,[26] since the bill which became the National Industrial Recovery Act was given consideration instead.[27]

The hearings and debates on the National Industrial Recovery Act showed that it was intended to reach the problem of interstate competition in conditions of employment. Senator Wagner stated[28] that its purpose was "to eliminate destructive practices, unfair practices, competition in the reduction of wages, and the lengthening of hours * * *." Industrial leaders agreed.[29]

The National Industrial Recovery Act required that all codes contain provisions for minimum wages and maximum hours. While that Act was in effect, there was a substantial improvement in labor conditions.[30] After the Act was invalidated by

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[26] H. Rept. No. 24, 73d Cong., 1st Sess.

[27] 77 Cong. Rec. 3611. See 82 Cong. Rec. 1487.

[28] Hearings before House Ways and Means Committee on H. R. 5664, 73d Cong., 1st Sess., p. 84.

[29] Henry I. Harriman, President of the United States Chamber of Commerce, *id.*, at 134; Mr. Geddes, General Manager of the Radio Manufacturers' Association, Hearings before Senate Finance Committee on S. 1712 and H. R. 5755, 73d Cong., 1st Sess., p. 63.

[30] House Doc. 158, 75th Cong., 1st Sess., *A Report on the Operation of the National Recovery Administration*, pp. 98, 108–110; National Recovery Administration, Research and Planning Division, *Hours, Wages, and Employment under the Codes* (January 1935); *id.*, *Report on the Operation of the National Industrial Recovery Act* (February 1935), pp. 33–40; Hearings on the Fair Labor Standards Act, note 40, *infra*, at 157.

this Court in May 1935,[31] bills were introduced to establish some form of regulation for the coal and textile industries in order to prevent recurrence of the cycle of falling wages and lengthening hours.

At the hearings on the Guffey Coal bill a representative of the United Mine Workers testified,[32] with the corroboration of a spokesman for the coal operators,[33] that—

> You cannot have an eight-hour day in one competing district, a ten-hour day in another, and a six-hour day in another. * * * None of these bituminous districts desire to make any wage negotiations at all unless they are involved in what you would call a competitive wage relationship * * *. They want to know just what the wage will be in Pennsylvania before they make a contract in West Virginia; what it will be in Ohio, where they are selling their coal; what

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[31] *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495. For testimony as to the decline in standards after this decision, see Hearings on the Fair Labor Standards Act, *infra*, Note 40, pp. 159–160 (testimony of Leon Henderson), 310–316 (testimony of Isador Lubin); House Rept. No. 2590, 74th Cong., 2d Sess., *To Rehabilitate and Stabilize Labor Conditions in the Textile Industry of the United States*, pp. 4–8; 82 Cong. Rec. 1478, 83 Cong. Rec. 7316, 9173; Bowden, *Hours and Earnings before and after the N. R. A.*, Monthly Labor Review (January 1937), pp. 13–36.

[32] Hearings before a subcommittee of the House Committee on Ways and Means, 74th Cong., 1st Sess., on H. R. 8479, *Stabilization of Bituminous Coal Mine Industry*, pp. 88–89 (testimony of Henry Warrum).

[33] *Id.*, at p. 171 (testimony of Charles O'Neill).

it will be in Illinois or Indiana, or in Kentucky.

The effect of differences in wage rates upon the flow of coal in interstate commerce is vividly brought out by the findings of the trial court in *Carter* v. *Carter Coal Co.*, 298 U. S. 238. The court found [34] from the record in that case, which contained an extensive analysis and description of conditions in the coal industry, that between the years 1923 and 1929 shipments of coal from Pennsylvania, Ohio, Illinois and Indiana decreased 52,800,000 tons, while shipments from West Virginia, Kentucky, and Virginia increased 50,300,000 tons. This was because—

> The shift or diversion of shipments after 1923 from the northern to the southern group was primarily due to a reduction of f. o. b. mine prices in the South more rapidly than in the North * * *. The relatively lower southern f. o. b. mine prices after 1923 were due primarily to the greater reductions in wage rates, which the southern employers, operating on a non-union basis substantially throughout this period, were able to effect.

The court concluded [35] that "in the bituminous coal industry cutting of wage rates is the predominant

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[34] See *Carter* v. *Carter Coal Co.*, October Term, 1935, No. 636, Transcript of Record, pp. 181–183, Findings of Adkins, J.

[35] *Id.*, at p. 211.

and most effective method of gaining competitive advantages."

Substantially the same competitive situation for the textile industry was described at the hearings on the Ellenbogen Bill introduced in both the 74th and 75th Congresses.[36] Governor Earle, of Pennsylvania, stated that[37]—

> No single State or group of States can cope with the problem of cutthroat competition in any industry whose product is even partially in the stream of interstate commerce.

There was a vast amount of testimony to the same effect.[38]

After invalidation of the N. R. A. codes, Congress required that the award of Government contracts be made to bidders who would comply with prevailing minimum labor standards, in order to prevent persons with the lowest standards of labor from underbidding their competitors and thus obtaining Government contracts.[39] The competitive

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[36] See note 21, *supra*, p. 26. Consideration of the textile bill was halted when it was determined to pass a general wage-and-hour bill (82 Cong. Rec. 1495).

[37] Hearings before a subcommittee of the House Committee on Labor, 74th Cong., 2d Sess., on H. R. 9072, *to Rehabilitate and Stabilize Labor Conditions in the Textile Industry of the United States*, p. 539.

[38] See note 45, *infra*, p. 34.

[39] The purpose of the Walsh-Healey Public Contracts Act, 49 Stat. 2036, U. S. C., Title 41, Supp V, Secs. 35–45, to eliminate competition in labor standards appears plainly from its legislative history. See 80 Cong. Rec. 1002, 1009, 1010, 1018; Hearings before House Committee on the Ju-

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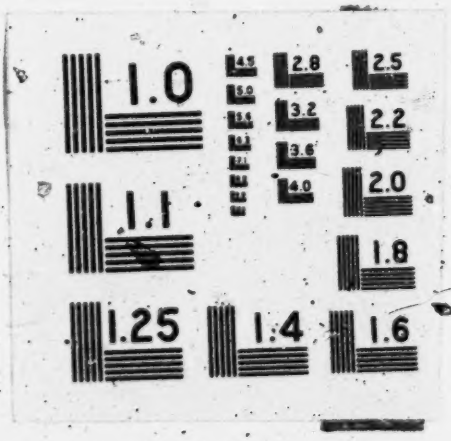

advantage of such person would extend, of course, to private interstate sales as well as to sales to the Government.

3. *The Fair Labor Standards Bill.*—Finally, the bill which became the Fair Labor Standards Act, applying to interstate business generally, was introduced. Although the hearings held during the previous five years on related legislation might well have been regarded as giving Congress sufficient factual basis for a new act dealing with wages and hours, extensive hearings were again held, and over twelve hundred pages of testimony were taken.[40] It seems sufficient to give a few excerpts from this voluminous mass of testimony.

The president of the manufacturing firm of Johnson and Johnson testified that:[41]

> * * * In all the discussions which have taken place regarding better wages and shorter hours, I have heard but one good

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diciary, 74th Cong., 1st Sess., on S. 3055, pp. 16, 79–82, 116–117, 364, 378; Hearings before a subcommittee of the House Committee on the Judiciary, 74th Cong., 2d Sess., on H. R. 11554, pp. 153–156, 190, 211, 222–223, 266–270, 282–283, 336, 360–361, 442–446, 529–530. Excerpts from the debates and hearings on this Act are collected in the Appendix to the petitioner's brief, pp. 20–60, in *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113.

[40] See Joint Hearings, before the Senate Committee on Education and Labor and the House Committee on Labor, 75th Cong., 1st Sess., on S. 2475 and H. R. 7200, *bills to Provide for the Establishment of Fair Labor Standards in Employment in and Affecting Interstate Commerce.*

[41] *Id.*, at p. 95 (testimony of Robert Johnson).

> reason for paying low wages and working long hours, and that is because some competitor down the street is doing so. * * *

A former member of the New York State Minimum Wage Board explained [42] that state minimum wage orders had largely been restricted to service industries and retail stores, in substantial part because—

> administering State wage laws we have had to realize that a neighboring State holds open arms to an employer who feels the pressure of higher standards at home. * * * It is because of this competition which extends beyond State boundaries that Federal regulation of labor standards in interstate commerce is necessary—not as a substitute for State regulation, but as an addition to it.

A member of the Wisconsin Trades Practice Commission declared that: [43]

> * * * We have in several instances been confronted with inability to maintain State standards of wages and hours and minimum cost prices because of interstate commerce competition, and we have no doubt that we will be confronted with many more instances as we meet the demands of numerous industries that have for months been knocking at our doors for standards and as more of the understandard operators become alert to

[42] *Id.*, at p. 365 (testimony of Elinore M. Herrick).
[43] *Id.*, at p. 413 (testimony of Fred M. Wylie).

and take advantage of the over-the-State-line method of evading the State standards.

Dr. Isador Lubin, Commissioner of Labor Statistics, testified as to the effect of termination of the N. R. A. codes in the textile industry; he summarized his data as follows: [44]

> In other words, the firms that did not cut their wages lost business, and the firms that cut their wages 37 percent or more increased the actual amount of business as measured in man-hours of employment for their workers by about 60 percent.

These statements are representative of a body of testimony before Congress and available in official publications which would reach prodigious proportions even in summary; representative citations are set forth in the margin.[45] It seems suffi-

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[44] *Id.*, pp. 312–313.

[45] See Hearings before the House Committee on Labor, 73rd Cong., 1st Sess., on S. 158 and H. R. 4557, *The Thirty Hour Week Bill*, pp. 15, 25–26, 93, 115, 169, 172–173, 212–213, 491–492, 496–497, 499, 501–504, 512–513, 533–534, 736–738, 741, 812, 814–816, 824–826, 838–839, 885–888, 961, 977–979; Hearings before House Committee on Ways and Means, 73rd Cong., 1st Sess., *on National Industrial Recovery*, pp. 9, 55–56, 80, 84, 88, 94, 122; Hearings before Senate Finance Committee on S. 1712 and H. R. 5755, 73rd Cong., 1st Sess., pp. 6, 63; Hearings before a subcommittee of the House Committee on Labor, 74th Cong., 2nd Sess., on H. R. 9072, *to Rehabilitate and Stabilize Labor Conditions in the Textile Industry of the United States*, pp. 15, 16, 22, 27, 52, 53, 60, 62, 89, 90, 92, 93, 138, 139, 141, 143, 146, 149, 150, 154, 155, 162, 219–225, 232–236, 243, 248, 250, 293, 294, 310–311, 336, 536–539, 601, 611–612, 784–785; Joint Hearings before the Senate Committee on Education and Labor and the House Committee on Labor,

cient to note that Congress enacted the Fair Labor Standards Act with full recognition of the fact, self-evident in any event, that maintenance of adequate labor standards in industries which compete in interstate commerce could be accomplished only by federal action.

4. *The Lumber Industry.*—The Fair Labor Standards Act was enacted with a view to eliminating from interstate channels goods of whatever nature, when produced under substandard labor conditions. The legislature did not intend to differentiate between specific industries, nor does the constitutional problem vary according to the type of goods in question. But the lumber industry is peculiarly illustrative of conditions to which the Fair Labor Standards Act is directed. Especially since the appellee is a lumber producer, it seems appropriate to bring the situation in this industry to the Court's attention.[46]

Lumber is produced in every state but North Dakota, and shipped in interstate commerce from every state but three.[47] Over fifty-seven percent

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75th Cong., 1st Sess., on S. 2475 and H. R. 7200, *the Fair Labor Standards Act of 1937*, pp. 93–95, 111, 127, 134, 140, 160, 175, 183, 187, 193, 200, 245, 250, 309–316, 397–398, 402, 403–407, 413–414, 455; see also notes 12–16, 29–31, 39, pp. 23–25, 28–29, 31.

[46] In a strict sense, since appellee can raise no constitutional questions but his own, it could be argued that he can attack the Act only as it applies to the lumber industry. See p. 115, note 19, *infra*.

[47] The material in this paragraph is taken from United States Department of Agriculture, Forest Service, *Lumber Distribution and Consumption for 1936*, compiled by R. V.

of the lumber produced enters into interstate or foreign commerce. The extent of the interstate movement appears from the fact that the leading western producing states, Washington and Oregon, ship lumber to each of the forty-seven other states; Alabama, in the southern producing area, ships to thirty-six other states, and Georgia to twenty-eight. The interstate character of the competition in the lumber markets is shown by the number of producing states from which each state obtains the lumber it consumes. New York receives lumber from thirty-eight other states, Ohio from thirty-six, Illinois from thirty-four. Even the producing states receive substantial quantities of lumber from without their borders, Georgia, for example, receiving over seventeen percent of the lumber it consumes from seventeen other states. The appellee's own operations are shown by the indictment to extend as far afield as New York, Ohio, South Carolina, and Florida (R. 11–14).

The advantage which accrues to the wage cutter in this industry was brought to the attention of Congress during the debates on the Fair Labor Standards Act. A letter from an Alabama lumber operator stated that (81 Cong. Rec. 7648):

> There is prevailing in the lumber industry in the South today a variance in wages of common labor in sawmills and the lumber

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Reynolds and A. H. Pierson (1938), Table 5, pp. 19–24, which sets forth the amount of lumber shipped from each state to each other state in 1936.

industry of 10 cents per hour to 27½ cents per hour and weekly hours of 40 to 60 per week.

This difference in wages and hours makes a very unfair competition between producers and has a tendency to lower wages and increase hours per week. It makes hard competition for the mill that wants to shorten hours and pay good wages.

Studies of the Bureau of Labor Statistics show that in 1932 the *average* wage in Georgia sawmills was 13.4¢ per hour and the average earnings per week $5.67.[48] The average wage for laborers was even lower, being 9.4¢ per hour and $3.76 per week, respectively, and many, of course, received less than the average.[49] The average annual wage for all employees in the lumber industry in Georgia in 1937 was $388.91, lower than in any other state.[50] The competitive significance of these low wages is indicated by the fact that the average mill price of yellow pine in Georgia in 1937 was considerably below that of any other state.[51]

We submit that this brief survey demonstrates that conditions in the lumber industry are precisely those which the Fair Labor Standards Act was

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[48] United States Department of Labor, Bureau of Labor Statistics, Bulletin No. 586, p. 6.

[49] *Id.*, at p. 32, 38.

[50] Computed from United States Bureau of the Census, *Census of Manufactures, 1937: Lumber and Timber Products*, Table 2. This figure does not indicate what proportion of the year the employee worked in the industry.

[51] *Id.*, Table 8.

designed to correct. The low wages and long hours spread throughout the national market by use of the channels of interstate commerce have resulted in labor standards far below the minimum necessary for subsistence.

5. *The Legislative Findings.*—The elaborate investigation conducted by Congress may well have been unnecessary, for its results were a matter of common knowledge. As was said in *West Coast Hotel Co.* v. *Parrish,* 300 U. S. 379, 399, "It is unnecessary to cite official statistics to establish what is of common knowledge through the length and breadth of the land." This Court has already taken judicial notice, without the presentation of any factual brief, of the familiar economic conditions upon which the Fair Labor Standards Act is based. See *Thornhill* v. *Alabama,* 310 U. S. 88; *Apex Hosiery Co.* v. *Leader,* October Term, 1939, No. 638; *Whitfield* v. *Ohio,* 297 U. S. 431, 439. In the *Thornhill* case the Court said (p. 103):

> It is recognized now that satisfactory hours and wages and working conditions in industry and a bargaining position which makes these possible have an importance which is not less than the interests of those in the business or industry directly concerned. The health of the present generation and of those as yet unborn may depend on these matters, and the practices in a single factory may have economic repercussions upon a whole region and affect wide-

> spread systems of marketing. The merest glance at state and federal legislation on the subject demonstrates the force of the argument that labor relations are not matters of mere local or private concern. * * *.

In *Whitfield* v. *Ohio, supra,* p. 439, the Court noted with respect to an analogous problem that "free labor, properly compensated, cannot compete successfully with the enforced and unpaid or underpaid convict labor."

Nevertheless, it was upon the foundation of its own investigations that Congress based the findings of fact set forth in the committee report and in Section 2 of the Fair Labor Standards Act.

The House committee report, No. 2182, 75th Cong., 3d Sess., p. 7, succinctly summarizes the facts upon which the legislation rests:

> Section 2 of the committee amendment contains a statement of the effect which the maintenance of substandard labor conditions exerts on interstate commerce. This finding is abundantly supported by the testimony at the joint hearings held on H. R. 7200 and S. 2475 during the first session of the Seventy-fifth Congress. The hearings indicate (1) that the maintenance of substandard labor conditions in a particular industry by a few employers necessarily lowers the labor standards of the whole industry, and that this lowering of the standards is brought about by reason of the fact that the channels of interstate commerce

have been open to goods produced under substandard labor conditions; (2) that the overwhelming majority of reputable employers consider competition in wages as an unfair and unconscionable method of competition in commerce; (3) that the maintenance of substandard labor conditions by the few employers referred to results in a downward spiral of wages in the industry with consequent dissatisfaction among employees in the industry which in turn results in labor disputes in the industry; and (4) that the States are unable to remedy the situation because goods which were produced under substandard labor conditions in one State may, protected by the failure of Congress to exercise its commerce power, flow freely into another State which attempts to maintain fair labor standards.

The judgment of its committee was accepted by Congress, and the quoted conclusion was substantially repeated in Section 2 of the Act, *infra*, p. 119. Indeed, the debates on the floor showed general agreement among members of Congress, whether supporting or opposing the legislation, as to the competitive importance of labor standards.[32]

[32] See 81 Cong. Rec. 7648–7649, 7667, 7668, 7722, 7780, 7848, 7868; 82 Cong. Rec. 1390, 1395, 1397, 1402, 1406, 1467–1468, 1478, 1478–1479, 1497–1498, 1510, 1601, 1671, 1672–1673, 1807; 83 Cong. Rec. 7284, 7286, 7290, 7291, 7298, 7299, 7312, 7316, 7317, 7324, 7418, 7435. Congressional debates may be resorted to "in determining * * * what were the evils sought to be remedied" (*Federal Trade Commission* v. *Raladam Co.*, 283 U. S. 643, 650), and "as a means of ascertain-

In the court below appellee objected to the consideration of these findings. But they serve here only to corroborate what would be known or presumed to the Court without them. *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152–153.

The wealth of economic material and facts of common knowledge makes it unnecessary to rely on the legislative findings. Nonetheless they are entitled to and should be given the greatest weight. *Stafford* v. *Wallace*, 258 U. S. 495, 521; *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1, 37.[53]

6. *The Legal Limitations.*—We have sketched the economic incapacity of the states to remedy long hours and low wages in interstate industry. This incapacity rests in part upon the commerce clause itself.

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ing the environment at the time of the enactment of a particular law, that is, the history of the period when it was adopted" (*Standard Oil Co.* v. *United States*, 221 U. S. 1, 50). See, also, *Humphrey's Executor* v. *United States*, 295 U. S. 602, 625; *United States* v. *San Francisco*, 310 U. S. 16, 22.

[53] Appellee's contention below was that the principle, that great weight was to be given the legislative findings, applied only to questions of due process and not to the question of whether "particular circumstances have a direct or indirect effect upon interstate commerce." But it was with respect to that precise point that the statement in the *Stafford* and *Olsen* cases was made that:

"This court will certainly not substitute its judgment for that of Congress in such a matter unless the relation of the subject to interstate commerce and its effect upon it are clearly non-existent."

Because of the commerce clause the states cannot, in the absence of congressional authorization, prohibit the importation of goods produced under conditions forbidden to home industries. *Leisy* v. *Hardin*, 135 U. S. 100; *Baldwin* v. *Seelig*, 294 U. S. 511. It is unnecessary to labor the point that, since the commerce clause is in terms simply an affirmative grant of authority to Congress, it can only deprive the states of power over a subject if it places the power thus stripped from the states in the federal government.

Even if a state could protect itself against the introduction of goods produced under substandard conditions in other states, it could not thereby safeguard its industries against the loss of their markets in the forty-seven other states of the Union. This national market is, of course, vital to the commerce and industry of each state, which have been developed on a nation-wide scale as a result of the prohibition which the commerce clause imposed upon the power of each state to exclude the products of other states from their local markets.

It is, then, plain enough that the interstate labor problem cannot be solved by state action. Interstate competition, expanded for a century and a half under the commerce clause, makes efforts by the states themselves to improve wages and hours in industries with interstate markets wholly futile as a matter both of economic fact and of constitutional law. This has been seen to be the conclu-

sion whether one proceeds from facts of common knowledge, from the legislative findings, from the Congressional investigations, or from the economic studies of labor conditions.

B. THE COMMERCE CLAUSE WAS DESIGNED TO GIVE CONGRESS POWER TO REGULATE COMMERCIAL MATTERS OF NATIONAL CONCERN WHICH ARE BEYOND THE COMPETENCE OF THE INDIVIDUAL STATES

Only the national government, as we have shown, can undertake to deal with the evil of substandard wages or hours of employment in an industry which produces for an interstate market. The commerce clause was designed to empower Congress to deal with just such problems.

1. *The Federal Convention.*[1]—The Constitutional Convention met chiefly because the Articles of Confederation gave the federal government no power to regulate commerce.[2] The Virginia dele-

[1] The content of this subsection is developed in Stern, *That Commerce Which Concerns More States Than One*, 47 Harv. L. Rev. 1335.

[2] The states possessing seaports availed themselves of their good fortune to impose duties on imports, a good part of which consumers in other states had to pay. Several efforts to give Congress power over commerce failed to secure the unanimous vote necessary under the Articles of Confederation. The attempted Annapolis convention, which met to consider the problem of "commercial regulations", led to the calling of the federal convention at Philadelphia. See 1 Elliot, *Debates on the Federal Constitution* (2d ed. 1836), 92, 106–119; 1 Bancroft, *History of the Formation of the Constitution of the United States* (1882), 250; Warren, *The Making of the Constitution* (1928), 85.

gation had prepared a series of resolutions as a basis for discussion.[3] The sixth of these resolutions, proposed by Governor Randolph four days after the Convention assembled, read in part as follows:[4]

> that the National Legislature ought to be impowered to enjoy the Legislative Rights vested in Congress by the Confederation & moreover to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation; * * *

The broad standard thus proposed for the division of power between state and nation was approved by the Convention on May 31st by a vote of nine states in favor, none against, one divided.[5] The New Jersey plan, proposed by Paterson shortly afterwards, included in a short enumeration of federal powers the provision that Congress could "pass Acts for the regulation of trade & commerce as well with foreign nations as with each other".[6] The New Jersey plan was rejected and the Virginia plan reapproved, on June 19th, by a vote of seven states to three, one being divided.[7]

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[3] Madison's *Debates*, as reported in H. Doc. No. 398, 69th Cong., 1st Sess. (1927), entitled "*Documents Illustrative of Formation of the Union of the American States*", 114.

[4] *Id.*, at 117.

[5] *Id.*, at 129, 130.

[6] *Id.*, at 205.

[7] *Id.*, at 234.

On July 17th, when Randolph's resolution on the division of powers again came up for debate, an amendment which might have limited the broad standard proposed by Randolph, was defeated.[8] Instead, a motion by Bedford of Delaware to extend its scope was adopted, and the resolution as amended approved by a vote of eight to two.[9] The resolution then read, in terms considerably broader than even the Randolph proposal, as follows:[10]

> VI. Resolved, That the national legislature ought to possess the legislative rights vested in Congress by the confederation; and moreover, to legislate in all cases for the general interests of the union, and also in those to which the states are separately incompetent, or
> in which the harmony of the United States may be interrupted by the exercise of individual legislation.

With the other resolutions approved by the Convention, this resolution was then sent to the "Come of detail * * * to * * * report the Con-

[8] It was proposed by Sherman of Connecticut, who alone had opposed the resolution originally, and read (*id.*, at 388): "to make laws binding on the people of the United States in all cases which may concern the common interests of the Union; but not to interfere with the Government of the individual States in any matters of internal police which respect the Govt. of such States only, and wherein the general welfare of the U. States is not concerned."

[9] *Id.*, at 389–390.

[10] *Id.*, at 389, 466. The additional power to legislate "in all cases for the general interests of the Union" seemed even to Randolph to be "a formidable idea indeed." *Id.*, at 389.

stitution."[11] This committee made its report on August 6th, ten days later. As it was expected to do, it had changed the indefinite language of Resolution VI into an enumeration of the powers of Congress closely resembling Article I, Section 8 of the Constitution as it was finally adopted.[12] The commerce clause, which was passed unanimously and without debate read: "The Legislature of the United States shall have the power * * * To regulate commerce with foreign nations, and among the several States".[13]

Significantly, no member of the Convention at any time challenged or discussed the change made by the committee in the form of the provision for the division of powers between state and nation. This is susceptible of only one reasonable explanation—that the Convention believed that the enumeration conformed to the standard previously approved, and that the powers enumerated comprehended those matters as to which the states were separately incompetent and in which national legislation was essential.[14]

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[11] *Id.*, at 465.

[12] *Id.*, at 475. In the discussion of the Sixth Resolution, Mr. "Ghorum" (presumably Nathaniel Gorham, of Massachusetts) had stated (p. 384): "We are now establishing general principles, to be extended hereafter into details which will be precise & explicit."

[13] *Id.*, at p. 475.

[14] In *Carter* v. *Carter Coal Company*, 298 U. S. 238, 291–292, the majority opinion states that the change from the general resolution to the specific enumeration of powers

The commerce clause was the only one of the enumerated powers in which Congress was given any broad power to regulate trade or business, the primary occasion for the new constitution. The Convention must, therefore, have understood that by this clause it was granting to Congress all the power over trade or business which the national government would need to provide for situations which the states separately would be unable to meet.

It was the clear understanding of the state conventions called to consider the ratification of the Constitution that the division of power gave to the national government control of all matters of national, as contrasted with local, concern. On this point both the proponents and opponents of ratification agreed. Hamilton, in the New York Convention, urged[15] that:

> The powers of the new government are general, and calculated to embrace the aggre-

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shows that the Convention had abandoned the principles set forth in the resolution; it does not refer to the three votes of the Convention adopting or approving the Randolph resolution, or to the absence of any adverse vote, or to the expressed understanding of the delegates that the general principles of the Resolution were to be "extended" into a list of details. Instead, the opinion states that the Convention "declined to confer upon Congress" these powers. The history of the proceedings in the Convention demonstrates that this incomplete narration leaves a wholly incorrect impression.

[15] Elliot's *Debates*, II, 265. Other delegates to the New York Convention expressed the same thought. Chancellor

> gate interests of the Union, and the general interest of each state, so far as it stands in relation to the whole. The object of the state governments is to provide for their internal interests, as unconnected with the United States, and as composed of minute parts or districts * * *.

And in the Virginia Convention, James Monroe, opposing ratification, drew the same contrast between matters of national and those of local concern.[16]

There is, of course, no thought that in 1787 the framers and ratifiers of the Constitution had in contemplation either the close-knit economic structure which exists today, or the need for a system of national control coextensive with that structure. When they considered the need for regulating "commerce with foreign nations and among the several states," they were thinking in terms of the national control of trade with the European countries and the removal of barriers obstructing the movements of goods across state lines.[17] For in 1787 there was no need for national regulation of

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Livingston declared: "The truth is, the states, and the United States, have distinct objects. They are both supreme. As to national objects, the latter is supreme; as to internal and domestic objects, the former." *Id.*, II, 385. Melancthon Smith, opposing ratification, states: "The *state governments* are necessary for certain local purposes; the *general government for national purposes.*" *Id.*, II, 332.

[16] *Id.*, III, 214.

[17] Hamilton and Madison, *The Federalist*, Nos. VII, IX, XLII; Elliot's *Debates*, III, 260.

the internal trade or business of the new country. But the framers of the Constitution did not use language which would restrict the federal power to the methods of regulation immediately necessary. They were acutely conscious that they were preparing an instrument for the ages, not a document adapted only for the exigencies of the time.[18]

We do not suggest that the men who met in Philadelphia intended to give Congress, *in addition to* the enumerated powers, authority "to legislate in all cases for the general interests of the union," or "in those to which the states are separately incompetent". On the contrary the enumerated powers themselves constitute a list of such "cases", described in the general and flexible language found throughout the Constitution. We urge only that the powers enumerated should be construed in the spirit in which they were written, so that the goal

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[18] * * * we must bear in mind, that we are not to confine our view to the present period, but to look forward to remote futurity * * *. Nothing therefore can be more fallacious, than to infer the extent of any power proper to be lodged in the national government, from an estimate of its immediate necessities. There ought to be a *Capacity* to provide for future contingencies, as they may happen; and as these are illimitable in their nature, so it is impossible safely to limit that capacity." Hamilton, *The Federalist*, No. XXXIV, p. 147. See also Warren, *The Making of the Constitution*, at 82, in which he quotes from James Wilson and John Rutledge, members of the Convention.

Compare Marshall's statement that the Constitution was "intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs." *McCulloch* v. *Maryland*, 4 Wheat. 316, 415.

of those who framed the Constitution to accomplish those broad aims might be achieved.

2. *The Words of the Constitution.*—The purpose of the men who drew the Constitution thus seems reasonably clear: The Congress was to control all commercial matters of national concern, beyond the competence of the individual states to regulate. It has been suggested,[19] however, that they abandoned or defeated that purpose because they gave to the Congress only the power "to regulate Commerce * * * among the several States". But these under any usage are the broadest of terms. And when the term is read against the etymology of 1787 the breadth of its connotations becomes even clearer.[20]

Often, of course, "commerce" was used in the narrowest sense of buying, selling, and exchanging.[21] But the term also had a heavier load to carry. "Business" and "industry" were just beginning to acquire a secondary meaning quite different from the simplicity of their literal content,[22]

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[19] *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 291–292; see footnote 14, *supra*, p 46.

[20] The material in these paragraphs is derived, in the main, from Walton H. Hamilton and Douglass Adair, *The Power to Govern.*

[21] The dictionary definitions of this nature are collected in *The Power to Govern*, pp. 55–57, 206–207.

[22] *Id.*, pp. 49–53. Even today, "habitual diligence" is a primary definition of "industry", and the dictionary retains "the quality or state of being busy" as the first definition of "business", qualified by the epithet "obsolete". *Webster's New International Dictionary* (1939 ed.)

and the concepts now covered by those terms were often included within the scope of "commerce." In 1790 an author undertook to write a history of "commerce" because there was no satisfactory account of the "improvements in navigation, colonization, manufactures, agriculture, and their relative arts and branches."[23] Indeed, at the Convention itself, Pinckney referred to "Commercial men" as an inclusive contrast to "Professional men" and "the landed interest."[24] An economist's pamphlet, read at Franklin's home to some of the delegates to the Convention, stated that the "commerce of America, including our exports, imports, shipping, manufactures, and fisheries may be properly considered as forming one interest."[25] "Commerce," in short, was frequently used to refer to the entire moneyed economy—to the processes by which men obtained money, whether by the

[23] Adam Anderson, *An Historical and Chronological Deduction of the Origin of Commerce* (Dublin, 1790), Vol. I, p. v.

[24] June 25th; Madison's *Debates*, pp. 271–272. At another time he seems to have spoken in a narrower sense of the "promotion of agriculture, commerce, trades and manufactures". August 18th, *Id.*, p. 564.

[25] Collected with other papers and published as *A View of the United States of America * * * between the years 1787 and 1794 * * * the whole tending to exhibit the progress and present state of civil and religious liberty, population, agriculture, exports, imports, fisheries, navigation, ship-building, manufactures, and general improvement.* London, 1795. First published in Philadelphia, 1794, p. 7. See *The Power to Govern*, pp. 169–170, 239.

production or manufacture of goods for sale, or by the exchange of goods produced by others. Even today we can hear echoes of the eighteenth century speech. The phrases "commercial geography," "commercialize," and "commercial law" each speaks with overtones which embrace the whole industrial and financial economy.

Congress was not, of course, given the power to regulate "commerce," but only "commerce among the several States." The meaning of "among" has not changed since 1787. The dictionaries of that time[26] and of today[27] support Marshall's familiar definition. "The word 'among'," he declared "means intermingled with. A thing which is among others, is intermingled with them."[28] "Intermingled with" is not an invariable synonym for "among," but its use by Marshall shows that the commerce clause carries with it the concept of interrelationship rather than merely that of movement across state lines."[29]

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[26] *Samuel Johnson's Dictionary* (6th ed. 1785); *Perry's Royal Standard English Dictionary* (4th Am. ed. 1796); *Alexander's Columbian Dictionary* (1800); *Webster's Dictionary* (1st ed. 1806); *Webster's Dictionary* (1841 ed.).

[27] *Webster's Dictionary* (1931 ed.); *Funk & Wagnall's Standard Dictionary* (1928 ed.).

[28] *Gibbons* v. *Ogden*, 9 Wheat. 1, 194.

[29] Modern dictionaries express the same conception. The Standard Dictionary (1928 ed.) gives as one of the meanings of "among": "Affecting all or a number more than one, so as to be commonly shared by."

"Commerce among the several States," even if
e standards are those of etymology alone, there-
re carries a meaning far broader than that recog-
zed by the decision below. To the eighteenth cen-
ry reader it carried no implication that an
tegrated economic process was to be truncated
d a part only given to the control of Congress.
o recapture its full meaning today it would be
ecessary to abandon the felicity of the succinct
rase and to substitute a more labored expression,
ch as "the interrelated business transactions of
e several states."[30]

The men who met in Philadelphia in 1787 could
t anticipate the etymology of the twentieth cen-
ry. But they did realize that the Constitution
ust apply in a "remote futurity," bringing "con-
ngencies * * * illimitable in their nature."[31]
hey therefore set out in the preamble the great
rposes which they sought to attain, and which
ey had directed the Committee on Detail to trans-
te into the enumerated powers. The draftsmen
the Constitution were not given to literary
ourishes for their own sake; and the preamble
monstrates that the Convention understood that
e Constitution would serve and should be con-
rued to "promote the general welfare" and not

[30] Compare Corwin, *Congress's Power to Prohibit Com-
erce, a Crucial Constitutional Issue* (1933), 18 Corn. L. Q.
7, 502.

[31] Alexander Hamilton, *supra*, note 18, p. 49.

to perpetuate a union of states powerless where power is needed.[32]

3. *Judicial Recognition.*—The Court, however, does not today face its constitutional questions with only the document and an eighteenth century lexicon. Judicial decision, legislative practice, and the sheer weight of history have added a gloss to the words and a shape to the federation which perhaps could not have been foretold in 1787.

Yet the broad powers over commerce granted to Congress by the Constitution have been retained substantially unimpaired. The decisions of this Court, from their very beginning, have recognized that the commerce clause gives Congress power to meet the economic problems of the nation, whatever they may be. In *Gibbons* v. *Ogden,* 9 Wheat. 1, the first and the most authoritative decision under the commerce clause, Chief Justice Marshall, himself a member of the Virginia Ratifying Convention, laid down the basic principles. In his opinion he said:[33]

> Comprehensive as the word "among" is, it may very properly be restricted to *that commerce which concerns more states than one* * * *. The enumeration of the particular classes of commerce to which the power was to be extended * * * presupposes something not enumerated; and that something, if we regard the language or

[32] See Story, *Commentaries on the Constitution* (4th ed. 1873), sec. 459 *et seq.*, for recognition of the importance of the Preamble as a guide to construing the Constitution.

[33] 9 Wheat. at 194–195.

> the subject of the sentence, must be the exclusively internal commerce of a state. The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, *and to those internal concerns which affect the states generally;* but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. [Italics supplied.]

During the years which have intervened since that basic pronouncement, the Court has again and again reaffirmed, in quotation and paraphrase, the doctrine that the commerce power extends to "that commerce which concerns more states than one," and "to those internal concerns which affect the states generally". The quoted passage from *Gibbons* v. *Ogden* was repeated or restated in *Mayor of New York* v. *Miln,* 11 Pet. 102, 146, in 1837; in *The Daniel Ball,* 10 Wall. 557, 564, in 1870; in *Kidd* v. *Pearson,* 128 U. S. 1, 17, in 1888; in *Champion* v. *Ames,* 188 U. S. 321, 346, in 1903; in *The Employers' Liability Cases,* 207 U. S. 463, 493, 507, in 1908; and in the *Minnesota Rate Cases,* 230 U. S. 352, 398, in 1913.

Although "differences have arisen in" the application of these principles "to the complicated affairs" of the nation, they have "never [been] doubted, and universally approved" (*Employers'*

Liability Cases, supra, Mr. Justice Moody dissenting, at 507.[34] In one of the first of the leading cases of the modern era, the Court, speaking through the present Chief Justice, reaffirmed its adherence to the fundamental doctrine (*Minnesota Rate Cases,* 230 U. S. 352, 398):

> The words "among the several States" distinguish between the commerce which concerns more States than one and that commerce which is confined within one State and does not affect other States.

The Court in several cases has departed from the broad interpretation which the framers intended, but the reasoning of those cases stands substantially repudiated.[35] Apart from these cases, the

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[34] We cannot forbear calling to the attention of the Court this dissenting opinion, which so well explains the vision of the framers and the constitutional philosophy which is epitomized in the commerce clause. See 207 U. S., at 519–522.

[35] Compare *United States* v. *E. C. Knight Co.*, 156 U. S. 1, with *Standard Oil Co.* v. *United States*, 221 U. S. 1, 68, and *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 39; *Hopkins* v. *United States*, 171 U. S. 578, and *Anderson* v. *United States*, 171 U. S. 604, with *Stafford* v. *Wallace*, 258 U. S. 495, and *Tagg Bros. & Moorhead* v. *United States*, 280 U. S. 420; *Adair* v. *United States*, 208 U. S. 161, with *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548, *Virginian Ry. Co.* v. *System Federation No. 40*, 300 U. S. 515, *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, *supra*, and *Texas Electric Railway Co.* v. *Eastus*, 308 U. S. 637; *Hammer* v. *Dagenhart*, 247 U. S. 251, with *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, *supra*, and *Mulford* v. *Smith*, 307 U. S. 38; *Carter* v. *Carter*

Court from the beginning has given effect to the living principle that Congress may regulate "the commerce which concerns more States than one."

This Court has recognized that "commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business." *Swift and Company* v. *United States*, 196 U. S. 375, 398; cf. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 41. In *Stafford* v. *Wallace*, 258 U. S. 495, 519, and *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1, 35, the Court adverted to "the great changes and development in the business of this vast country", and declined to defeat the underlying purpose of the commerce clause to protect and control the stream of interstate commerce "by a nice and technical inquiry into the non-interstate character of some of its necessary incidents and facilities when considered alone and without reference to their association with the movement of which they were an essential but subordinate part." The *Swift* case, this Court declared in *Chicago Board of Trade* v. *Olsen, supra*, "merely fitted the commerce clause to the real and practical essence of modern business growth".[38]

Coal Co., 298 U. S. 238, with *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, *supra*, and *Santa Cruz Fruit Packing Co.* v. *National Labor Relations Board*, 303 U. S. 453.

[38] A word on the quite different problems of the Canadian and Australian federations may be appropriate.

In Canada, Dominion acts of 1935 regulating wages and hours were held *ultra vires* in *Atty.-Gen. for Canada* v.

The growth of the field in which the commerce power may be exercised is a direct and inevitable consequence of the integration of the national economic structure. In the eighteenth and early nineteenth centuries the business of a manufacturer was usually a local enterprise and of little national concern; today it plainly is not. The commerce clause itself has erased state lines for purposes of commerce, and has been largely responsible for the expansion of commerce into national rather than local markets. As the markets of the manufacturers expanded beyond state lines, the technical processes of production acquired a broader commercial significance. The apprentice to a New

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Atty.-Gen. for Ontario, [1937], A. C. 326. The British North America Act, 1867, confers upon the provinces "exclusive" power over certain subjects, including "Property and Civil Rights," and upon the Dominion, notwithstanding, "exclusive" authority over other subjects, including "The regulation of Trade and Commerce." §§ 91, 92. It was thus necessary to classify the enactments within one "exclusive" category or the other. See *Huddart Parker, Ltd.* v. *The Commonwealth* [1931], 44 C. L. R. 492, 526–527; W. Ivor Jennings, *Constitutional Interpretation—The Experience of Canada*, 51 Harv. L. Rev. 1. No comparable issue arises under our Constitution.

In Australia the wage-and-hour problem has not been treated under the commerce clause (subhead 1 of Section 51) of the Commonwealth of Australia Constitution Act, 1900, but under subhead 35, providing for conciliation and arbitration of industrial disputes. The cases thus have no bearing here. See, *e. g.*, *Australian Boot Trade Federation* v. *Whybrow & Co.*, 11 C.L. R. 311, 318, 345–346; *Waterside Workers Federation* v. *Comm. Steamship Owners Assoc.*, 28 C. L. R. 209; *Metal Trades Employers' Assoc.* v. *Amalgamated Engineering Union*, 36 C. A. R. 534.

York cordwainer in 1800 would have only a disinterested curiosity in the wages paid the Baltimore apprentice. Today the worker in a Massachusetts shoe factory knows that his earnings reflect the wage scales in New York, Georgia, Maine, and Missouri. If the result is that the field of possible congressional regulation under the commerce clause is enlarged, the cause is not a change in what the Constitution means, but a recognition of the vast expansion in the number and importance of those intrastate transactions which are now economically inseparable from interstate commerce—of the unification along national lines of our economic system.

In the sections of this brief which follow we shall deal with the specific sections of the Act which are here challenged; each will be seen to be well within the commerce powers of Congress as granted by the Constitution and as construed by this Court.

C. SECTION 15 (A) (1) IS A VALID EXERCISE OF THE COMMERCE POWERS OF CONGRESS

The Fair Labor Standards Act was enacted in order to meet the serious problems, which we have outlined above (*supra*, pp. 20–43), arising from the use of the channels of interstate commerce by goods produced under substandard labor conditions. The Act attacks these evils in two ways. It prohibits the interstate transportation of goods produced under such conditions, and it forbids the employment in interstate commerce or in the pro-

duction of goods for interstate commerce of employees working below the minimum standards established. These provisions, although separable in operation, are interrelated in purpose. Each will have the effect of lessening the extent of the evil in the state of origin, and each will protect other states which produce goods in competition with the state of origin from harm to their own labor standards as a competitive consequence of the more oppressive conditions.

We shall discuss first Section 15 (a) (1), which forbids the interstate shipment of goods produced under substandard labor conditions.[1] It declares that "it shall be unlawful for any person—

> to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 6 or section 7 . * * *[2]

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[1] Counts 13 to 19 of the indictment are based upon this provision. Counts 17 to 19 charge shipment in interstate commerce by defendant of goods which he produced in violation of the statutory standards. Counts 13 to 16 charge shipment by defendant in interstate commerce of goods which were produced by another, with the knowledge of the defendant, in violation of the Act.

[2] "Commerce" is defined in Section 3 (b) as "trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof."

Section 16 (a) provides penalties for violation of Section 15.

1. *Prohibition of Interstate Shipment is a Regulation of Commerce.*—The sales, shipments, and deliveries prohibited by Section 15 (a) (1) are in themselves interstate commerce. A prohibition of interstate shipment except in compliance with prescribed conditions is on its face a regulation of interstate commerce. This Court has often so ruled. *Mulford* v. *Smith,* 307 U. S. 38; *Currin* v. *Wallace,* 306 U. S. 1, 11–12; *Electric Bond & Share Co.* v. *Securities and Exchange Commission,* 303 U. S. 419, 442; *Champion* v. *Ames,* 188 U. S. 321; *United States* v. *Delaware & Hudson Co.,* 213 U. S. 366, 415; *Kentucky Whip & Collar Co.* v. *Illinois Central R. Co.,* 299 U. S. 334, 347.

Since Section 15 (a) (1) regulates interstate commerce, it would seem obvious that it falls within the commerce powers granted to Congress by Section 8 of Article I of the Constitution. Various arguments have been advanced, however, in support of the proposition that the commerce clause should not be construed to mean what it so plainly says. We shall discuss each of these points in turn.

2. *Harmless Commodities.*—It can no longer be contended that the power of Congress to restrict or condition interstate commerce is limited to articles in themselves harmful or deleterious. The Constitution, of course, contains no such limitation; it rests rather upon certain language in *Hammer* v. *Dagenhart.* But so narrow a reading of the

commerce clause has since been abandoned. *Brooks* v. *United States,* 267 U. S. 432; *Electric Bond & Share Co.* v. *Securities and Exchange Commission,* 303 U. S. 419; *Mulford* v. *Smith,* 307 U. S. 38; *Kentucky Whip & Collar Co.* v. *Illinois Central R. Co.,* 299 U. S. 334. The *Kentucky Whip & Collar* case, which upheld the validity of the Ashurst-Sumners Act as to prison-made goods generally is conclusive. It is manifest that the detrimental effects upon interstate commerce of prison labor are of the same kind as those of adult labor paid wages below the subsistence level. If Congress may take steps to close the channels of interstate commerce to the one, it can take similar action with respect to the other.

3. *The purpose of the prohibition against interstate shipments.*—The suggestion has been advanced that Congress may not exercise its commerce power, even over interstate commerce itself, for ends, however praiseworthy, which do not concern commerce, narrowly defined to mean merely transactions of exchange or transportation.

Since the Fair Labor Standards Act was intended to regulate interstate competition, to avoid the spread of harmful conditions by reason of use of the channels of interstate commerce, and to prevent labor disputes (see *supra,* pp. 39–40), we think it clear that the purpose of Congress in enacting the legislation was commercial in the strictest sense.

Even, however, if the Act were concerned simply with humanitarian ends it could not for that reason be held outside the scope of the enumerated powers. This Court has repeatedly proclaimed that the power of Congress to regulate commerce "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." *Gibbons* v. *Ogden*, 9 Wheat. 1, 196; *Kentucky Whip & Collar* v. *Illinois Central R. Co.*, 299 U. S. 334, 345; *United States* v. *Carolene Products Co.*, 304 U. S. 144, 147; *Currin* v. *Wallace*, 306 U. S. 1, 13–14. The paradoxical nature of the suggestion that a constitution adopted "in Order to * * * promote the general Welfare" might be violated because it achieved that very result needs no extended comment.

Such a construction of the commerce clause was repudiated in the first case arising under it. *United States* v. *The Brigantine William*, 28 Fed. Cas. No. 16700. (1808). Mr. Justice Story, in his *Commentaries* also expressly rejected the view that the clause permitted only advancement of the interests of commerce.[3]

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[3] Judge Davis, a member of the Massachusetts convention, declared (p. 621) that the power over commerce was not limited to its advancement but included the power to abridge it "in favour of the great principles of humanity and justice." The case is discussed in Warren, *The Supreme Court in United States History*, Vol. I, pp. 341–350.

[4] *Commentaries on the Constitution*, Secs. 1079–1089. In Section 1089 Story said: "Now, the motive of the grant of

This Court in repeated instances has sustained the exercise of the federal power over interstate commerce to accomplish objectives the promotion of which is not expressly conferred on Congress by the Constitution and which were appropriate objects of state legislation. Thus, the commerce power may be used with the objective of suppressing lotteries. *Champion* v. *Ames,* 188 U. S. 321. Or the purpose may be to promote health, *Hipolite Egg Co.* v. *United States,* 220 U. S. 45; to promote morality, *Hoke* v. *United States,* 227 U. S. 308; or to prevent theft of property or persons, *Brooks* v. *United States,* 267 U. S. 432; *Gooch* v. *United States,* 297 U. S. 124. In each of these cases the statutes were sustained because, irrespective of their various objectives, it was interstate commerce that was regulated.

"The authority of the Federal Government over interstate commerce does not differ in extent or character from that retained by the states over intrastate commerce." *United States* v. *Rock Royal Cooperative, Inc.,* 307 U. S. 533, 569. Cf. *Gibbons* v. *Ogden,* 9 Wheat. 1, 197, 227. Congress possesses, therefore, the same unlimited authority as do the

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the power is not even alluded to in the Constitution. It is not even stated that Congress shall have power to promote and encourage domestic navigation and trade. A power to regulate commerce is not necessarily a power to advance its interests. It may in given cases suspend its operations and restrict its advancement and scope. * * *. The motive to the exercise of a power can never form a constitutional objection to the exercise of the power."

states within their field to exercise "the police power, for the benefit of the public, within the field of interstate commerce." *Brooks* v. *United States, supra,* at 436–437; *Kentucky Whip & Collar Co.* v. *Illinois Central R. Co., supra; United States* v. *Carolene Products Co., supra; Currin* v. *Wallace, supra.*

4. *Section 15 (a) (1) does not regulate production.*—The contention that Section 15 (a) (1), which in terms prohibits only interstate shipments and sales, regulates production rather than commerce, plainly cannot be supported. A similar argument was made in *Mulford* v. *Smith,* 307 U. S. 38, where it was contended that the regulation of the amount of tobacco marketed in commerce was in fact a regulation of the production of tobacco because of an alleged intent to control, and a direct effect upon, the amount of tobacco which could be produced. The *Mulford* case is squarely in point here.

There the Court declared (307 U. S., at 47–48):

> The statute does not purport to control production * * * Any rule, such as that embodied in the Act, which is intended to foster, protect and conserve that commerce, *or to prevent the flow of commerce from working harm to the people of the nation,* is within the competence of Congress. Within these limits the exercise of the power, the grant being unlimited in its terms, may lawfully extend to the absolute

> prohibition of such commerce, and *a fortiori* to limitation of the amount of a given commodity which may be transported in such commerce. The motive of Congress in exerting the power is irrelevant to the validity of the legislation. [Italics added.]

Plainly the effect of a ban upon the interstate shipment of goods produced under substandard labor conditions has no greater effect upon intrastate production than did the prohibition involved in the *Mulford* case, and the power of Congress cannot reach to the one and fall short of the other.

The substance of the opposing argument is that any regulation of commerce which has a necessary effect upon matters outside the sphere of federal control is invalid. If the test of constitutionality were the existence of such collateral effects many unquestionably valid laws would fall. Distribution or marketing, transportation, and production are so interrelated that regulation of any one of them may, and often inevitably will, affect the others.[8]

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[8] As illustrative of the proposition that collateral effects do not determine constitutionality, it is sufficient to mention, in addition to the provisions of the Agricultural Adjustment Act sustained in *Mulford* v. *Smith*, the protective tariff, which directly affects the amount of domestic goods manufactured; the Lottery Act, which directly discourages lotteries; the Federal Kidnaping Act, which discourages kidnaping; and the Connally Hot Oil Act, which, through its restriction upon the shipment of oil in interstate commerce, inevitably affects the amount produced.

Compare the unquestioned validity of sumptuary taxes which are designed to discourage the activity taxed. See

In his dissenting opinion in *Hammer* v. *Dagenhart*, 247 U. S. 251, 277, Mr. Justice Holmes pointed out that many cases demonstrate that federal statutes are not rendered invalid because of their "deterrent" or "regulatory" effect upon matters not subject to congressional power—that "if an act is within the powers specifically conferred upon Congress, * * * it is not made any less constitutional because of the indirect effects that it may have, however obvious it may be that it will have those effects, * * *."[6]

5. *Hammer* v. *Dagenhart*.—Appellee relies largely on the authority of *Hammer* v. *Dagenhart*, 247 U. S. 251, which held unconstitutional a statute (39 Stat. 675) prohibiting the interstate transportation of child-made goods. That statute might be distinguished from the present Act on the ground that Congress has here made specific findings, based upon facts of common knowledge, as to the existence of a relationship between the stat-

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particularly *Veazie Bank* v. *Fenno*, 8 Wall. 533, 548; *McCray* v. *United States*, 195 U. S. 27, 60; *Sonzinsky* v. *United States*, 300 U. S. 506. Cf. *Magnano* v. *Hamilton*, 292 U. S. 40.

[6] The majority of the Court (and *a fortiori* the minority) recognized in *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330, 371, in treating an argument similar to that made by appellee here, that:

"The collateral fact that such a law may produce contentment among employees,—an object which as a separate and independent matter is wholly beyond the power of Congress,—would not, of course, render the legislation unconstitutional."

utory prohibition and interstate commerce. Cf. *Hill* v. *Wallace*, 259 U. S. 44, and *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1. And the economic integration of the nation in the past two decades has made even less tenable the basic postulate of self-sufficient states which underlay that decision. Apart, however, from the force to be given to these considerations, we recognize that the statute declared unconstitutional in *Hammer* v. *Dagenhart* is identical with the child-labor provisions in the present Act. And the prohibition against transporting goods produced by adults working under substandard labor conditions which is involved in this case cannot be distinguished in theory from the ban upon shipping goods produced by children.

The Child Labor Act in terms applied only to the transportation of goods across state lines; it thus regulated interstate commerce itself, and nothing else. But the majority of the Court viewed the Act as a mere regulation of labor in the states. Four Justices of this Court thought at the time that the statute was a regulation of interstate commerce within the meaning of the Constitution. We believe that they were correct, and that their views have been given effect by the Court in subsequent decisions. *Brooks* v. *United States*, 267 U. S. 432; *Kentucky Whip & Collar Co.* v. *Illinois Central R. Co.*, 299 U. S. 334; *Mulford* v. *Smith*, 307 U. S. 38; cf. *National Labor Relations Board* v.

Jones & Laughlin Steel Corp., 301 U. S. 1. In particular, the decision in *Hammer* v. *Dagenhart* is squarely inconsistent with *Mulford* v. *Smith*, *supra*, which upheld a prohibition of interstate commerce having just as great an effect upon production as the Child Labor Act.

The effect of the decision in *Hammer* v. *Dagenhart* was to establish a limitation upon the commerce power which is contained nowhere in the Constitution, and which is contrary to the scope of that grant of power as defined in cases running from *Gibbons* v. *Ogden*, 9 Wheat. 1, to the most recent decisions. *Kentucky Whip & Collar Co.* v. *Illinois Central R. Co.*, *supra*; *Mulford* v. *Smith*, *supra*. Since the states are precluded by the commerce clause itself from forbidding interstate shipments of goods produced under substandard labor conditions, the decision created a no man's land in which neither state nor nation could function. The establishment of such a hiatus in governmental power is plainly contrary both to the letter and spirit of the Constitution. Story, *Commentaries*, Sec. 1082; Mr. Justice Cardozo, dissenting in *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 326; *Sunshine Anthracite Coal Co.* v. *Adkins*, October Term, 1939, No. 804.

It is submitted that the Court has abandoned the principles which controlled the decision in *Hammer* v. *Dagenhart*, and that the case should be expressly overruled.

D. SECTION 15 (A) (2) IS A VALID EXERCISE OF THE COMMERCE POWER OF CONGRESS

Counts 1 to 11 of the indictment charge a violation of Section 15 (a) (2) of the Act. That section makes it unlawful for any person "to violate any of the provisions of section 6 or section 7". Section 6 required the payment of not less than twenty-five cents per hour and Section 7 the payment of not less than time and one-half for time in excess of forty-four hours per week[1] to each employee "who is engaged in commerce or in the production of goods for commerce".[2]

These provisions regulate the amount of wages paid and the hours worked by employees engaged in interstate commerce or in producing goods for that commerce.

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[1] These became 30 cents and 42 hours after October 24, 1939, but the changes are immaterial here.

[2] Commerce is defined as interstate commerce. Sec. 3 (b); see footnote 2, *supra*, p. 60. Section 3 (j) defines "produced" as meaning:

"* * * produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State."

The Wage and Hour Division has stated in its Interpretative Bulletin No. 5 that "employees are engaged in the production of goods 'for commerce' where the employer intends or hopes or has reason to believe that the goods or any unsegregated part of them will move in interstate commerce." (Paragraph 2.)

The customary analysis suggests that the question of the power of Congress to regulate these transactions is to be answered according as the wages and hours of employees producing the goods for interstate commerce have a "direct" or only an "indirect" effect upon that commerce. Standing alone, these terms do not carry much aid to the resolution of the issue. But the previous decisions of this Court have given the terms a precision which is more than ample for the needs of this case. Measured by the standards found in those decisions, it seems plain enough that the existence of substandard labor conditions in the production of goods for interstate commerce has a direct and substantial effect upon that commerce. This conclusion is dictated by any of several applicable analyses.

1. *The Section is an Appropriate Means by which to Keep the Interstate Channels Free of Goods Produced under Substandard Conditions.*—The object of the Fair Labor Standards Act is to prevent the use of the channels of interstate commerce by goods produced under substandard labor conditions. This is accomplished by the direct prohibition found in Section 15 (a) (1). If Congress has power to attain such an end (see pp. 59–69, *supra*), it also has the power to choose any means which it deems appropriate to its accomplishment. *McCulloch* v. *Maryland*, 4 Wheat. 316, 421. The prohibition against substandard labor conditions

in the production of goods *for* interstate commerce clearly is a reasonable and appropriate method of keeping goods produced under such conditions out of interstate commerce. Section 15 (a) (2) may thus be supported on the same ground as Section 15 (a) (1), since it is a provision reasonably designed to effectuate the prohibition against interstate shipments contained in the latter section.

The maxim that Congress may choose the means by which its powers are to be exercised has frequently found expression in statutes applicable to transactions not in themselves within any of the granted powers. Such regulations have been sustained for the reason that they were "essential in the legislative judgment to accomplish a purpose within the admitted power of the Government." *Purity Extract and Tonic Company* v. *Lynch*, 226 U. S. 192, 201–202; *Ruppert* v. *Caffey*, 251 U. S. 264; *Everard's Breweries* v. *Day*, 265 U. S. 545, 560; *Otis* v. *Parker*, 187 U. S. 606, 609; *Westfall* v. *United States*, 274 U. S. 256, 259; *St. John* v. *New York*, 201 U. S. 633.

This doctrine has frequently been applied to statutes enacted under the commerce clause.[3] A

[3] The congeries of regulatory and supervisory powers exercised in the administration of the Revenue Acts afford more distant analogies. And prohibition of the sale and manufacture of liquor which is not intoxicating has been sustained where power to prohibit the sale of intoxicating liquor existed, because the legislative body felt that control of nonintoxicating liquor was essential to the effectiveness of the primary prohibition. *Ruppert* v. *Caffey*, 251 U. S.

familiar illustration is the regulation of intrastate transactions which are so commingled with interstate transactions that all must be regulated if the latter are to be effectively controlled. *Shreveport Case,* 234 U. S. 342; *Wisconsin R. R. Commission* v. *Chicago B. & Q. R. Co.,* 257 U. S. 563; *Currin* v. *Wallace,* 306 U. S. 1; *Mulford* v. *Smith,* 307 U. S. 38.

Closely in point are other statutes in which a prohibition of interstate shipments has been supplemented by the regulation of transactions occurring before transportation began. The Meat Inspection Act forbids the shipment in interstate commerce of meat not inspected and passed by the Department of Agriculture (34 Stat. 1260, U. S. C., Tit. 21, Sec. 78). But that Act also requires that establishments slaughtering and processing meat to be used in interstate or foreign commerce permit federal inspection and appropriate disposition of all animals before slaughter.[4] These steps take place during the "production" of meat as food. Their utility and value as methods of keeping unwholesome meat out of interstate commerce are obvious, and their constitutionality has not been seriously questioned in thirty-four years.

264; *Everard's Breweries* v. *Day,* 265 U. S. 545, 560; *Purity Extract and Tonic Company* v. *Lynch, supra.*

[4] All animals showing symptoms of disease in the inspection are to be set apart, killed separately, and given a *post mortem* examination, and all carcasses found to be unfit for use as food are to be destroyed forthwith (U. S. C., Title 21, Secs. 71, 72).

Cf. *United States* v. *Lewis*, 235 U. S. 282; *Pittsburgh Melting Co.* v. *Totten*, 248 U. S. 1; *Houston* v. *St. Louis Independent Packing Co.*, 249 U. S. 479.

The Secretary of Agriculture is also authorized to prevent the interstate transportation of cattle affected with a communicable disease (23 Stat. 31, 32 Stat. 791, 33 Stat. 1264, U. S. C., Title 21, Sec. 111 *et seq.*). By regulation he has required that cattle in infected areas be inspected and dipped in curative solutions. His power to require such dipping has been sustained not only as to cattle ranging across state lines, *Thornton* v. *United States*, 271 U. S. 414, but also as to domestic cattle in diseased areas which might infect cattle moving in interstate commerce. *Carter* v. *United States*, 38 F. (2d) 227 (C. C. A. 5th), certiorari denied, 281 U. S. 753.

The same principle has been given effect with respect to transactions occurring after the interstate journey has been completed. The Food and Drugs Act (34 Stat. 768, U. S. C., Title 21, Sec. 2) prohibits interstate commerce in misbranded foods. It has been held that this statute applies to the labeling of articles on the retailers' shelves after interstate transportation has ceased, so as to preclude a state from enforcing inconsistent labeling regulations as to such goods. *McDermott* v. *Wisconsin*, 228 U. S. 115. The Court recognized the power of Congress to "determine for itself the character of the means necessary to make its pur-

pose effectual in preventing the shipment in interstate commerce of articles of a harmful character" (*ibid.* at 135).

These illustrations demonstrate the power of Congress to supplement regulations of interstate transportation by ancillary measures applying before or after the interstate journey. It has the same power with respect to goods produced under substandard labor conditions for interstate commerce. The transportation of such goods is in itself made unlawful by Section 15 (a) (1). And Congress is not required to withhold its hand until the employer has started the goods on their interstate journey. Cf. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 41–42. Direct prohibition of such conditions in the production of goods for interstate commerce manifestly tends to effectuate and implement the policy of keeping goods manufactured under those conditions out of commerce. It was within the power of Congress to adopt this means of achieving its legitimate object.

2. *The Section Prevents Unfair Competition in or Affecting Interstate Commerce.*—Even if Section 15 (a) (2) be regarded as entirely independent of Section 15 (a) (1) and as a separate regulation of the wages and hours obtaining in the production of goods for interstate commerce, it would be valid as a regulation directly affecting interstate commerce. This conclusion must be

reached whether the section be viewed as a means of controlling competition in interstate commerce or as preventing labor disputes from interrupting that commerce. We shall discuss the former approach in this subsection.

In Section 2 of the Act Congress found, *inter alia:*

> * * * that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; * * * (3) constitutes an unfair method of competition in commerce; * * * (5) interferes with the orderly and fair marketing of goods in commerce.

The substance of these findings is that the employers who pay the lowest wages obtain an unfair advantage which diverts interstate trade to them at the expense of their competitors. That this finding clearly portrays conditions which would in themselves be subject to judicial notice has been amply demonstrated (*supra,* pp. 20–41).

Since the Fair Labor Standards Act imposes minimum labor standards only upon employers who sell or ship in interstate commerce, or who

produce goods for that commerce, it is restricted in its scope to persons engaged in interstate competition. Thus, the issue presented is whether Congress has power to regulate practices which are a means of competition in interstate commerce.

That question can no longer be regarded as an open one. The Sherman Act, the Clayton Act, and the Federal Trade Commission Act was each enacted in exercise of such a power. The cases arising under these familiar statutes outlaw various types of commercial practices affecting interstate competition. Their primary purpose is to eliminate practices deemed inimical to the public welfare which give persons using them an advantage over their competitors, and divert interstate trade from those whose standards better comport with the public interest.

The determination of what practices are against public policy is obviously a legislative matter. It is for Congress to decide whether low labor standards are as harmful as penny candy lotteries [5] or price discrimination.[6] But, so far as the scope of the commerce power is concerned, the nature of the practice is not material, as long as it does in fact divert the course of interstate trade from one competitor to another.

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[5] *Federal Trade Commission* v. *Keppel & Bro.*, 291 U. S. 303.

[6] *Van Camp & Sons* v. *American Can Co.*, 278 U. S. 245; *American Can Co.* v. *Ladoga Canning Co.*, 44 F. (2d) 763 (C. C. A. 7th), certiorari denied, 282 U. S. 899.

This power to prevent particular methods of interstate competition has been sustained without regard for the interstate or intrastate situs of the transaction itself. The cases under the antitrust laws and the Federal Trade Commission Act generally assume, with little or no discussion, that the statutes apply as long as interstate competition is affected. This Court is fully familiar with the many cases applying the Sherman Act to intrastate transactions.[7] The Federal Trade Commission Act has also frequently been applied to intrastate practices affecting interstate competition.[8]

In the application of Section 7 of the Clayton Act, which forbids the acquisition by one corporation engaged in commerce of stock in another so engaged where interstate competition will be lessened, it has never been thought material whether

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[7] See e. g., *Northern Securities Co.* v. *United States*, 193 U. S. 197; *Swift and Co.* v. *United States*, 196 U. S. 375; *United States* v. *Patten*, 226 U. S. 525; *Duplex Printing Co.* v. *Deering*, 254 U. S. 443; *United Mine Workers* v. *Coronado Coal Co.*, 259 U. S. 344; *Local 167* v. *United States*, 291 U. S. 293; *Apex Hosiery Co.* v. *Leader*, No. 638, October Term, 1939.

[8] See *Federal Trade Commission* v. *Eastman Kodak Company*, 7 F. (2d) 994 (C. C. A. 2d), affirmed on another ground, 274 U. S. 619; *Chamber of Commerce of Minneapolis* v. *Federal Trade Commission*, 13 F. (2d) 673 (C. C. A. 8th); *National Harness Mfrs. Assn.* v. *Federal Trade Commission*, 268 Fed. 705 (C. C. A. 6th); *Temple Anthracite Coal Company* v. *Federal Trade Commission*, 51 F. (2d) 656 (C. C. A. 3d); see *Federal Trade Commission* v. *Raladam Co.*, 283 U. S. 643, 647.

The question whether the Federal Trade Commission Act should be construed to apply to intrastate sales has been pre-

the acquisition of stock was interstate or intrastate so long as interstate competition in the commodities produced by the corporations was suppressed.[9]

In *American Can Co.* v. *Ladoga Canning Co.*, 44 F. (2d) 763 (C. C. A. 7th), certiorari denied, 282 U. S. 899, it was held to be sufficient to establish a violation of Section 2 of the Clayton Act (38 Stat. 730, 15 U. S. C., Sec. 13), that a price discrimination in connection with intrastate sales lessened competition in interstate commerce between two purchasing companies. Compare *Van Camp & Sons* v. *American Can Co.*, 278 U. S. 245.

These illustrations are sufficient to demonstrate the power of Congress to prevent the diversion of interstate trade to competitors engaged in practices deemed harmful to the public interest. A corresponding power must exist for those acts proscribed by the Fair Labor Standards Act which

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sented to this Court by petition for a writ of certiorari (*Federal Trade Commission* v. *Bunte Bros.*, No. 85, this Term, 110 F. (2d) 412 (C. C. A. 7th)). The question raised in that case is solely one of statutory construction and the court below did not suggest the absence of constitutional power to control intrastate sales or methods which injure interstate commerce.

[9] *Federal Trade Commission* v. *Western Meat Company*, 272 U. S. 554; *International Shoe Company* v. *Federal Trade Commission*, 280 U. S. 291; *Arrow-Hart and Hegeman Electric Company* v. *Federal Trade Commission*, 291 U. S. 587; *Aluminum Co. of Am.* v. *Federal Trade Commission*, 284, Fed. 401 (C. C. A. 3d), certiorari denied, 261 U. S. 616; *Temple Anthracite Coal Company* v. *Federal Trade Commission*, 51 F. (2d) 656 (C. C. A. 3d). See *Northern Securities Co.* v. *United States*, 193 U. S. 197.

Congress now deems to be detrimental to the welfare of the nation. The low wages of some competitors divert interstate trade to just as great an extent as do the practices forbidden by the Federal Trade Commission Act. The Fair Labor Standards Act, which is limited in its operation to employees who are engaged in interstate commerce or in the production of goods for such commerce, thus affords merely another illustration of the settled power of Congress to insure fair standards among interstate competitors.

3. *The Question is Settled by the Labor Board Cases.*—Perhaps the shortest answer to the attack upon Section 15 (a) (2) is that it relates to employer-employee relationships which have already been established by the Labor Board cases as within the federal commerce power.[10]

Santa Cruz Packing Co. v. *National Labor Relations Board,* 303 U. S. 453, is most closely in point; it involved a vegetable packing company, which obtained raw materials within the state, processed them, and shipped thirty-seven percent of the finished product into interstate commerce. Indeed,

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[10] *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 38–40; *National Labor Relations Board* v. *Friehauf Trailer Co.*, 301 U. S. 49; *National Labor Relations Board* v. *Friedman-Harry Marks Clothing Co.*, 301 U. S. 58; *Santa Cruz Packing Co.* v. *National Labor Relations Board*, 303 U. S. 453, 463 *et seq.*; *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197; *National Labor Relations Board* v. *Fainblatt*, 306 U. S. 601, 604; and see *Apex Hosiery Co.* v. *Leader*, October Term, 1939, No. 638.

the lumber industry itself has repeatedly been held to be subject to the National Labor Relations Act.[11] Thus, there can be no question that the relations between appellee and his employees, who produce goods for interstate commerce,[12] are subject to the federal commerce power as exercised in the National Labor Relations Act.

That statute in terms applies to persons engaged in unfair labor practices "affecting" interstate commerce. The Fair Labor Standards Act, as the bill passed the House, followed the same pattern and applied to employers "engaged in commerce in an industry affecting commerce"; the Secretary

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[11] *Carlisle Lumber Co.* v. *National Labor Relations Board*, 94 F. (2d) 138 (C. C. A. 9th), certiorari denied, 304 U. S. 575; *Carlisle Lbr. Co.* v. *National Labor Relations Board*, 99 F. (2d) 533 (C. C. A. 9th), certiorari denied, 306 U. S. 646; *National Labor Relations Board* v. *Carlisle Lbr. Co.*, 108 F. (2d) 188; *National Labor Relations Board* v. *Biles Coleman Lbr. Co.*, 94 F. (2d) 197, 98 F. (2d) 16, 98 F. (2d) 18; *National Labor Relations Board* v. *Connor Lbr. & Land Co.*, 102 F. (2d) 998 (C. C. A. 7th); *National Labor Relations Board* v. *Crossett Lbr. Co.*, 102 F. (2d) 1003 (C. C. A. 8th); *National Labor Relations Board* v. *Meadow Valley Lbr. Co.*, 101 F. (2d) 1014 (C. C. A. 9th); *National Labor Relations Board* v. *Red River Lbr. Co.*, 109 F. (2d) 157, 110 F. (2d) 810 (C. C. A. 9th); *M. & M. Wood Working Co.* v. *National Labor Relations Board*, 101 F. (2d) 938 (C. C. A. 9th); cf. *Bradley Lbr. Co.* v. *National Labor Relations Board*, 84 F. (2d) 97 (C. C. A. 5th), certiorari denied, 299 U. S. 559.

[12] Under certain circumstances the Labor Relations Act has even been applied to employees neither engaged in interstate commerce nor in the production of anything to be shipped in commerce. *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197.

of Labor was to determine after hearing which industries affected commerce. (H. Rept. 2182, 75th Cong., 3d Sess.). The Conference Committee, after the *Santa Cruz* decision, adopted a simpler formula.[13] The delegation to the Secretary of Labor was eliminated, and the Act was expressly made applicable to employees engaged in the production of goods for commerce. The Fair Labor Standards Act in its general application thus is intended to, and by its terms does, apply only to some of the employees who prior to its enactment had been held subject to the protection of the National Labor Relations Act.

4. *The Section Prevents Labor Disputes Obstructive of Interstate Commerce.*—The Labor Board cases, indeed, are controlling here on the basis of their precise reasoning.

Section 15 (a) (2) serves, equally with the National Labor Relations Act, to prevent or minimize labor disputes which directly obstruct interstate commerce. In Section 2 of the Act Congress found:

> * * * that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers * * * leads to labor disputes

[13] H. Rept. No. 2738, 75th Cong., 3d Sess., p. 28. The legislative history does not give explicit indication that the *Santa Cruz* decision was the reason for the change.

> burdening and obstructing commerce and the free flow of goods in commerce; * * *

This finding, too, states a fact of common knowledge. Even without official statistics we assume that the Court would take judicial notice of the fact that long hours and low wages, as much as the denial of the employees' right to bargain collectively, are a major cause of labor disputes and strikes. Indeed, the demand for collective bargaining on the part of employees generally arises as a result of unsatisfactory terms and conditions of employment.

Available data demonstrate that wages and hours, even to a greater extent than the right to bargain collectively, have been a fundamental cause of labor strife. Reports of the Bureau of Labor Statistics reveal that over a long period of years fifty percent of strikes have been caused by wages and hours alone and over sixty percent by wages and hours combined with the question of union recognition.[14]

The courts have frequently had before them cases indicating that divergent labor standards in competitive industries bring on industrial strife

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[14] See the Table in Appendix B, *infra*, pp. 151–154. The figures presented by the Government in the Labor Board cases also showed that wages and hours were the cause of more labor disputes than organization and collective bargaining. See *Associated Press v. National Labor Relations Board*, 301 U. S. 103, October Term, 1936, No. 365, brief for National Labor Relations Board, p. 144.

obstructive of commerce. In a number of familiar cases dealing with the violent and disastrous strikes in the coal industry from 1898 until relatively recent times, the strikes were caused primarily by the attempt of labor in the organized fields to prevent nonunion areas with lower wage scales from destroying their wage standards through the processes of competition.[15] The same situation was found to have resulted in a violent dispute in the men's clothing industry. *Alco-Zander Co.* v. *Amalgamated Clothing Workers,* 35 F. (2d) 203 (E. D. Pa.). The cause of the controversy in *Duplex Printing Press Co.* v. *Deering,* 254 U. S. 443, was the retention by the Duplex Company of lower labor standards than its interstate competitors. See 254 U. S., at 480.[16]

The power of Congress to legislate for the purpose of preventing strikes obstructive of interstate

[15] *Hitchman Coal & Coke Co.* v. *Mitchell,* 245 U. S. 229, 243; *United Mine Workers* v. *Coronado Coal Co.,* 259 U. S. 344, 403–404; *International Organization* v. *Red Jacket C. C. & C. Co.,* 18 F. (2d) 839 (C. C. A. 4th), certiorari denied, 275 U. S. 536; *Pittsburgh Terminal Coal Corp.* v. *United Mine Workers,* 22 F. (2d) 559 (W. D. Pa.). See, also, National Labor Relations Board, Division of Economic Research, *The Effect of Labor Relations in the Bituminous Coal Industry Upon Interstate Commerce,* Bulletin No. 2, June 30, 1938.

[16] Of four printing-press manufacturers in the United States, three recognized the defendant union and had granted their employees an eight-hour day and certain minimum wages. The Duplex Company had not. Two of the three union manufacturers notified the union that they would be obliged to terminate their agreements unless Duplex entered into a similar arrangement with equally high standards. The refusal of Duplex to do so brought on the strike and boycott involved in that case.

commerce is, of course, thoroughly established by the Labor Board cases. Unsatisfactory wages and hours are the most prolific cause of labor disputes. Congress has exercised its power to prohibit one important cause of labor disputes which obstruct commerce—the refusal of employers to recognize and deal with the freely chosen representatives of their employees. For precisely the same reason, Congress may seek to correct substandard labor conditions as a means of preventing and avoiding the other major cause of labor disputes which interfere with commerce.

5. *The Cases Relied Upon by Appellee.*—Appellee relies on *Schechter Poultry Corp.* v. *United States,* 295 U. S. 495, and *Carter* v. *Carter Coal Company,* 298 U. S. 238. Neither is controlling here.

The *Schechter* case is plainly distinguishable. The labor conditions there subjected to regulation were those of employees in local poultry houses in New York City which processed and then sold poultry to retailers in that city. The regulation thus applied to local activities after the poultry had come to rest at the end of the interstate journey. Cf. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1, 40. The Fair Labor Standards Act does not reach such persons, but applies only to employees engaged in commerce or in the production of goods for commerce.

In the *Carter Coal* case, a majority of the Court held that Congress lacked power to regulate hours

and wages and to require collective bargaining in the bituminous coal industry. The premise upon which the opinion rested was that conditions of labor were incidents of production, and that the power of Congress did not extend to the production of goods, regardless of how "substantial" was the effect on interstate commerce. That ruling is wholly inconsistent with the subsequent decisions of the Court holding that the commerce power extends to all intrastate transactions which directly or substantially affect interstate commerce, even though they occur during the course of production of goods in a mine or factory. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1; *National Labor Relations Board* v. *Fruehauf Trailer Co.*, 301 U. S. 49; *National Labor Relations Board* v. *Friedman-Harry Marks Clothing Co.*, 301 U. S. 58; *Santa Cruz Fruit Packing Co.* v. *National Labor Relations Board*, 303 U. S. 453; *National Labor Relations Board* v. *Fainblatt*, 306 U. S. 601; *National Labor Relations Board* v. *Bradford Dyeing Co.*, No. 588, October Term, 1939, decided May 20, 1940.

In three cases, the lower courts have held that the power of Congress extends to requiring collective bargaining by producers of coal whose coal is sold in interstate commerce. *Clover Fork Coal Co.* v. *National Labor Relations Board*, 97 F. (2d) 331 (C. C. A. 6th); *National Labor Relations Board* v. *Crowe Coal Company*, 104 F. (2d) 633 (C. C. A. 8th), certiorari denied, 308 U. S. 584; *National*

Labor Relations Board v. *Good Coal Co.*, 110 F. (2d) 501 (C. A. A. 6th), certiorari denied May 6, 1940, No. 884. Certiorari was sought and denied in two of the cases. These decisions are, of course, squarely inconsistent with the *Carter* case. Although the majority of the Court has not expressly so stated, dissenting Justices have frequently declared [17] that the decisions in the Labor Board cases are inconsistent with the *Carter* case, and the Circuit Court of Appeals for the Ninth Circuit has held that case overruled. *Edwards* v. *United States*, 91 F. (2d) 767; *Santa Cruz Fruit Packing Co.* v. *National Relations Board*, 91 F. (2d) 790 (C. C. A. 9th), affirmed, 303 U. S. 453. Although we are confident that the case is no longer authoritative, it is still being pressed before lower courts, and, as the instant case demonstrates, is occasionally given considerable weight. Under these circumstances, the *Carter* case should be expressly overruled.

Defendants also have cited *Kidd* v. *Pearson*, 128 U. S. 1; *Heisler* v. *Thomas Colliery Co.*, 260 U. S. 245; *United States* v. *E. C. Knight Co.*, 156 U. S. 1; and the *Coronado* cases.[18] The *Kidd* case upheld a state statute prohibiting the manufacture of intoxi-

[17] *Labor Board Cases*, 301 U. S. 1, 76; *Santa Cruz Fruit Packing Co.* v. *National Labor Relations Board*, 303 U. S. 453, 469-470; *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 240-241; *National Labor Relations Board* v. *Fainblatt*, 306 U. S. 601, 613.

[18] *United Mine Workers* v. *Coronado Coal Co.*, 259 U. S. 344; *Coronado Coal Co.* v. *United Mine Workers*, 268 U. S. 295.

cating liquor, and the *Heisler* case a state tax. In *Santa Cruz Fruit Packing Co.* v. *National Labor Relations Board*, 303 U. S. 453, 466, this Court, in answer to the same argument based upon the same cases, stated:

> * * * Nor are the cases in point which are cited by petitioner with respect to the exercise of the power of the State to tax goods, which have not begun to move in interstate commerce or have come to rest within the State, or to adopt police measures as to local matters. In that class of cases the question is not with respect to the extent of the power of Congress to protect interstate commerce, but whether a particular exercise of state power in view of its nature and operation must be deemed to be in conflict with that paramount authority. *Bacon* v. *Illinois*, 227 U. S. 504, 516; *Stafford* v. *Wallace*, *supra*, p. 526; *Minnesota* v. *Blasius*, 290 U. S. 1, 8.

The *Knight* case, which held the Sherman Act inapplicable to a monopoly of virtually all of the sugar refineries in the United States is no longer authoritative. See *Standard Oil Co.* v. *United States*, 221 U. S. 1, 68–69; *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 39. The *Coronado* cases "related to the applicability of the federal statute and not to its constitutional validity." *Apex Hosiery Co.* v. *Leader*, *supra*, Footnote 9; *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 40.

E. SECTIONS 11 (C) AND 15 (A) (5) ARE VALID

Count 12 of the indictment is based upon Sections 11 (c) and 15 (a) (5). Section 11 (c) requires every employer subject to the Act to keep such records of wages, hours, and conditions of employment as the Administrator by regulation or order shall prescribe;[1] Section 15 (a) (5) makes it unlawful to violate this requirement or knowingly to keep or make false records or reports. They plainly are ancillary to the regulatory sections of the Act. In order to enforce the wage and hour provisions Congress can, of course, compel the keeping of records which will disclose the wages paid and the hours worked by the employers and employees subject to the Act. *Fleming* v. *Montgomery Ward & Co.* (C. C. A. 7th), decided July 18, 1940, certiorari pending, No. 407, sustained the validity of these provisions.

Thus, once the constitutionality of the substantive sections is shown, the validity under the commerce clause of Sections 11 (c) and 15 (a) (5) inevitably follows. See *Baltimore & Ohio R. Co.* v. *Interstate Commerce Commission,* 221 U. S. 612; *Interstate Commerce Commission* v. *Goodrich Transit Co.,* 224 U. S. 194; *Chicago Board of Trade* v. *Olsen,* 262 U. S. 1; *Bartlett Frazier Co.* v. *Hyde,* 65 F. (2d) 350 (C. C. A. 7th), certiorari denied, 290 U. S. 654.

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[1] The Regulations promulgated by the Administrator are found in Appendix A, *infra,* pp. 144–150.

Since appellee makes no separate attack upon these provisions, further consideration of them seems unnecessary.

II

The Fair Labor Standards Act Does Not Violate the Tenth Amendment

It has been shown that the Fair Labor Standards Act was enacted in exercise of the power granted Congress to regulate interstate commerce. This disposes of the argument that the Act violates the Tenth Amendment, which merely provides that—

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Language could not express more clearly that the Amendment does not reserve to the states any part of any power which is "delegated to the United States by the Constitution," nor indicate more plainly that the Amendment does not limit the scope of any power which is delegated to the United States. The amendment has no independent operation. It comes into effect only after a determination that an Act of Congress is not authorized under the granted powers.

These propositions seem self-evident. But the argument of appellee and several relatively recent decisions of this Court[1] suggest the desirability

[1] *Hopkins Savings Assn.* v. *Cleary*, 296 U. S. 315, 335–336; *United States* v. *Butler*, 297 U. S. 1, 68; *Ashton* v. *Cameron County Dist.*, 298 U. S. 513, 527.

that we again call to the Court's attention the circumstances under which the Amendment was adopted and the numerous cases in which it has been understood to mean simply what it says. A rather more elaborate argument to that end has been presented by the Government in its briefs in *United States* v. *Bekins*, 304 U. S. 27, No. 757, October Term, 1937, and *Mulford* v. *Smith*, 307 U. S. 38, No. 505, October Term, 1938, and an argument similar to this in *Oklahoma* v. *Woodring*, 309 U. S. 623, No. —, Orig., October Term, 1939. In none of these cases has the Court found it necessary to make explicit mention of the Tenth Amendment. Since the Court has not made wholly clear its own adherence to the view that the Tenth Amendment offers no independent limitation upon the federal powers, we again present a compressed statement of the fuller discussion found in the earlier briefs.

1. *The Adoption of the Tenth Amendment.*—The first ten amendments are a close adaptation of those proposed by Massachusetts in ratifying the Constitution.[2] Because the omission of a bill of rights was generally regarded as the most vulnerable point in the proposed charter,[3] John Hancock, president of the Massachusetts Convention, pro-

[2] The first of the nine recommendations of Massachusetts read: "That it be explicitly declared that all powers not expressly delegated by the aforesaid Constitution are reserved to the several states, to be by them exercised" (Elliot's *Debates*, I, 322).

[3] Warren, *The Making of the Constitution*, p. 769.

posed the amendments "in order to remove the doubts and quiet the apprehensions of gentlemen" (Elliot's *Debates*, II, 123).[4]

The discussion in the ratifying conventions confirms the plain meaning of the words of the Tenth Amendment, and indicates that the proponents wished merely to insure that the central government would in truth be one of delegated powers.[5] The delegates who opposed the amendment did so largely on the ground that it was unnecessary, if not dangerous.[6] The anxiety for this declaratory rule of construction may be traced to two fears: that the national government might assert the right

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[4] Thereafter four States which ratified the Constitution similarly expressed their earnest hope for a bill of rights. Elliot's *Debates*, I, 325–332. It may be noted that only in Massachusetts and New Hampshire was the Tenth Amendment offered as an amendment (*id.*, I, 322, 326); in South Carolina, Virginia, and New York it was set forth as declaratory of the conventions' understanding of the construction of the Constitution (*id.*, I, 325, 327). Maryland ratified without attaching proposed amendments, but a minority of its convention addressed a statement to the people of that State, explaining that the Constitution was "very defective," and recommending various amendments, including one similar to the Tenth Amendment (*id.*, II, 547, 550, 555).

[5] Massachusetts: Adams and Jarvis (*id.*, II, 131, 153); Virginia: Mason and Grayson (*id.*, III, 442, 449); North Carolina: Bloodworth (*id.*, IV, 167).

[6] Massachusetts: Varnum (*id.*, II, 78); Virginia: Nicholas, Randolph, and Madison (*id.*, III, 450, 464, 600, 620, 626); North Carolina: Maclaine and Iredell (*id.*, IV, 140, 149); South Carolina: Pinckney (*id.*, IV, 315–316); Pennsylvania: Wilson and M'Kean (*id.*, II, 435–436, 540).

to exercise powers not granted,[7] and that the states would be unable fully to exercise the powers which the Constitution had not taken from them.[8]

When the proposed amendments were introduced by Madison in the first Congress, "to give satisfaction to the doubting part of our fellow-citizens" (1 Annals of Congress 432), he viewed the Tenth Amendment as merely declaratory (1 Annals 441):

> I find, from looking into the amendments proposed by the State conventions, that several are particularly anxious that it should be declared in the Constitution, that the powers not therein delegated should be reserved to the several States. Perhaps other words may define this more precisely than the whole of the instrument now does. I admit they may be deemed unnecessary; but there can be no harm in making such a declaration, if gentlemen will allow that the fact is as stated. I am sure I understand it so, and do therefore propose it.

There was no other explanatory statement in the briefly recorded debate on this amendment.[9] Even

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[7] North Carolina: Bloodworth (Elliot's *Debates*, IV, 167): Virginia: Henry (*id.*, III, 446).

[8] Virginia: Grayson, Henry, Mason (*id.*, III, 449, 446, 441). For the possible convenience of the Court, citations to additional discussion of the proposals which became the Tenth Amendment are: *Id.*, II, 153, 540; III, 464, 588, 589, 622.

[9] Madison, in the course of debate on Hamilton's bank proposal, on February 2, 1791, when nine states had ratified

the original reservation in the Articles of Confederation of powers not "expressly" delegated, it is to be noted, was intended by the Continental Congress to do no more than to preserve the autonomy of the states.[10] But the adoption of the Tenth Amendment was accompanied by a deliberate refusal to reserve to the states all powers not "expressly" granted to the national government.[11] While Madison's proposals for new amendments were under consideration in Congress, Tucker and

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the amendments which he had proposed, said (2 Annals 1897):

"Interference with the power of the States was no constitutional criterion of the power of Congress. If the power was not given, Congress could not exercise it; if given, they might exercise it, although it should interfere with the laws, or even the Constitution of the States."

[10] Thomas Burke, writing to Governor Caswell from the Congress, on April 29, 1777, said the proposed articles originally "expressed only a reservation of the power of regulating the internal police, and consequently resigned every other power. It appeared to me that this was not what the States expected, and, I thought, it left it in the power of the future Congress * * * to make their own power as unlimited as they please." Burke accordingly proposed the article which, after two days of spirited debate, was adopted 11–1, with one state divided. 7 Journals of Cont. Cong. 122–123.

[11] This was the wording of Article II of the Articles of Confederation, of the Massachusetts (footnote 2, *supra*, p. 91) and New Hampshire (Elliot's *Debates*, I, 326) proposals, of the South Carolina declaration (*id.*, I, 325), and of the statement of the minority of the Maryland convention (*id.*, II, 550). New York referred to powers "clearly" delegated (*id.*, I, 327). Only Virginia, in its declaration, made no such qualification (*id.*, I, 327).

Gerry each moved to amend this proposal so as to reserve to the states the powers not *expressly* delegated; each motion was defeated (1 Annals of Congress 761, 767–768). Whether or not a reservation to the states of powers not expressly delegated would have impaired the last clause of Section 8 of Article I, granting powers "necessary and proper", it is plain that there was a deliberate choice of the Congress to except from the reservation to the states the powers granted to Congress by implication. This choice cannot be squared with any argument that appropriate federal powers cannot be exercised because of the operation of the Tenth Amendment.

The men who proposed the Tenth Amendment seem, then, to have been quite clear that the Amendment was simply declaratory of the evident proposition that Congress could not constitutionally exercise powers not granted to it, and that these powers could continue to be exercised by the states.[12]

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[12] As Story said (Story, *Commentaries on the Constitution*, secs. 1907–1908):

"This amendment is a mere affirmation of what, upon any just reasoning, is a necessary rule of interpreting the Constitution. * * *

"It is plain, therefore, that it could not have been the intention of the framers of this amendment to give it effect as an abridgement of any of the powers granted under the Constitution, whether they are express or implied, direct or incidental. Its sole design is to exclude any interpretation by which other powers should be assumed beyond those which are granted. * * *"

2. *The Judicial History of the Amendment.*—The plain purpose of the Amendment has been confirmed by more than a century of constitutional history. The decisions of this Court have reiterated that the Tenth Amendment offers no independent limitation upon the powers granted to the United States but merely states the unquestioned principle that the central government is one of enumerated powers.

This was the interpretation of the Tenth Amendment when, in *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 325, it was first considered by this Court.[13] Chief Justice Marshall, in *McCulloch* v. *Maryland*, 4 Wheat. 316, said that the amendment "was framed for the purpose of quieting the excessive jealousies which had been excited" and that it left open the question "whether the particular power * * * has been delegated to the one government, or prohibited to the other" (4 Wheat. at 405, 406).[14] Taney, as well, accepted this self-evi-

[13] In 1808 in *United States* v. *The Brigantine William*, 28 Fed. Cas. No. 16,700 (D. Mass.), Judge Davis, a member of the Massachusetts Convention, stated with respect to the powers of the states that (p. 622): "The general position is incontestible, that all that is not surrendered by the constitution, is retained. The amendment which expresses this is for greater security; but such would have been the true construction, without the amendment."

[14] Even Luther Martin, Attorney General of Maryland, conceded in the course of argument that the amendment meant what it said, that it was merely "declaratory of the sense of the people" and designed to allay an apprehension which the federalists "treated as a dream of distempered jealousy" (4 Wheat., at 372, 374).

dent proposition. *Gordon* v. *United States*, 117 U. S. 697, 705 (1864). This Court has continued to treat the Tenth Amendment as containing no limitation on the powers granted to the United States. *Champion* v. *Ames*, 188 U. S. 321, 357; *Northern Securities Co.* v. *United States*, 193 U. S. 197, 344–345; *Everard's Breweries* v. *Day*, 265 U. S. 545, 558. It has recognized, as in *United States* v. *Sprague*, 282 U. S. 716, 733, that "The Tenth Amendment was intended to confirm the understanding of the people at the time the Constitution was adopted * * *. It added nothing to the instrument as originally ratified * * *."

However, the clarity of these decisions has been obscured by several of the recent opinions of this Court, which have indicated a view that the Tenth Amendment contained an independent limitation on the powers of Congress. *Hopkins Savings Assn.* v. *Cleary*, 296 U. S. 315, 335–336; *United States* v. *Butler*, 297 U. S. 1, 68 (but compare *Mulford* v. *Smith*, 307 U. S. 38); *Ashton* v. *Cameron County Dist.*, 298 U. S. 513, 527 (but compare *United States* v. *Bekins*, 304 U. S. 27). And see the approach adopted in the opinions in *Steward Machine Co.* v. *Davis*, 301 U. S. 548, 585–592; *Helvering* v. *Davis*, 301 U. S. 619, 640–645; and *Cincinnati Soap Co.* v. *United States*, 301 U. S. 308, 312.

In none of these opinions did the Court explicitly announce a departure from its historic treatment of the Tenth Amendment, and they hardly can be

thought to have overruled *sub silentio* so important a constitutional doctrine. Particularly is this the case when other, and contemporaneous, decisions retain the accepted interpretation of the Tenth Amendment. *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 330–331; *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1 (cf. p. 97); *Associated Press* v. *National Labor Relations Board*, 301 U. S. 103 (cf. p. 105); *Mulford* v. *Smith*, 307 U. S. 38 (cf. pp. 52–53, 55–56); *Sonzinsky* v. *United States*, 300 U. S. 506 (cf. p. 508); *Wright* v. *Union Central Ins. Co.*, 304 U. S. 502, 516; see *United States* v. *California*, 297 U. S. 175, 184.

The plain meaning of the language of the Tenth Amendment, the circumstances of its adoption, and a century of constitutional litigation support the approach represented by the opinions last cited. We respectfully submit that it should be adopted in this case. Any other rule must condemn constitutional interpretation to a perpetual servitude to sophistry and contradiction; neither layman nor scholar can ever be expected to contrive a satisfactory touchstone by which to determine what powers delegated to the national government may not be exercised because reserved to the states as a power "not delegated to the United States."

III

THE FAIR LABOR STANDARDS ACT DOES NOT VIOLATE THE FIFTH AMENDMENT

A. THE QUESTION IS PROPERLY BEFORE THIS COURT

Appellee raised and argued the question of due process in the District Court. But that court did not hold that the Fair Labor Standards Act violated the Fifth Amendment. On the contrary, in a decision handed down the same day sustaining the validity of the Act as applied to railroad employees, the court rejected the argument that the Act contravened the due process clause.[1]

The general rule is that a respondent or appellee may offer any argument in support of the judgment below, at least when made in the lower court. *Langnes* v. *Green*, 282 U. S. 531. This rule was held applicable to the raising of various constitutional objections under the Criminal Appeals Act in *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 330. Although the Court in *United States* v. *Borden Co.*, 308 U. S. 188, 207, refused to hear argument on questions of statutory construction not

[1] *Morgan* v. *Atlantic Coast Line Railroad*, 32 F. Supp. 617 (S. D. Ga., Waycross Division), decided April 29, 1940. The court entered the following conclusion of law: "The establishment of minimum wages by Congress by the Fair Labor Standards Act is not arbitrary or capricious or an unreasonable interference with liberty of contract in violation of the due process clause of the Fifth Amendment."

decided by the district court, it reaffirmed the holding in the *Curtiss-Wright* case, since there "the decision of the District Court was not based upon a particular construction of the underlying statute, but upon its invalidity."

Since the question of due process relates to the validity of the underlying statute in the instant case, the *Curtiss-Wright* case controls here.[2] Accordingly, we believe that the due process issues raised and argued by appellee are properly before the Court. We shall, therefore, address the remainder of this brief to those questions.

The appellee's arguments are that the Fair Labor Standards Act is arbitrary, capricious and thus violative of due process because it (1) unduly interferes with liberty of contract; (2) fixes a uniform and inflexible standard for the entire country; (3) discriminates in favor of agriculture in general, and the producers of naval stores in particular; and (4) is too indefinite to apprise citizens as to whether or not they are subject to the Act. There is no substance to any of these contentions.

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[2] If the Court should no longer regard the distinction between the *Curtiss-Wright* and the *Borden* cases as satisfactory, we submit that for reasons stated in the opinion the former case correctly applies the Criminal Appeals Act to those matters which are subject to review under it, and that the *Borden* case was wrongly decided on this point.

B. THE ACT DOES NOT UNDULY LIMIT LIBERTY OF CONTRACT

It should be pointed out as a preliminary matter (with reference to this and the two succeeding points) that appellee can rely upon no fact in the record, and has as yet presented none which is subject to judicial notice, to show that the legislation is arbitrary. The burden of supporting the charge of unconstitutionality is, of course, on the assailant of the statute. In the absence of facts demonstrating its invalidity the constitutionality of the law must be presumed. *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152–153; *Metropolitan Ins. Co.* v. *Brownell*, 294 U. S. 580, 584, and cases cited. But, even without the aid of presumptions, the Act seems plainly valid.

The due process clause imposes no greater restriction upon federal legislation in the field of interstate commerce than upon state legislation regulating intrastate activities. *Nebbia* v. *New York*, 291 U. S. 502, 524; *United States* v. *Rock Royal Co-operative, Inc.*, 307 U. S. 533, 571; *Sunshine Anthracite Coal Co.* v. *Adkins*, October Term, 1939, No. 804. Congress has full authority to exercise "the police power, for the benefit of the public, within the field of interstate commerce." *Brooks* v. *United States*, 267 U. S. 432, 436; *Kentucky Whip & Collar Co.* v. *Illinois Central R. Co.*, 299 U. S. 334, 347; *United States* v. *Carolene Products Co.*, *supra*, at p. 147; *Currin* v. *Wallace*, 306

U. S. 1, 11–12. Thus if a state wage and hour law similar to the Fair Labor Standards Act would not violate the Fourteenth Amendment, the federal statute does not transgress the Fifth Amendment.

This Court has sustained the power of the states to fix maximum hours for women [3] and for men engaged in industrial occupations,[4] and has sustained the device of implementing maximum hour provisions by requiring extra pay for overtime.[5] It has sustained the right of the states to prescribe minimum wages for women generally.[6] It has sustained the power of Congress and the states to establish minimum wages for men in certain occupations or under special circumstances.[7] These decisions, which uphold statutes restricting freedom of contract to the same extent as does the Fair Labor Standards Act, would seem clearly to be controlling here. They are conclusive of the validity of the Fair Labor Standards Act under the due process clause with respect to the maximum hour provi-

[3] *Muller* v. *Oregon*, 208 U. S. 412; *Riley* v. *Massachusetts*, 232 U. S. 671; *Hawley* v. *Walker*, 232 U. S. 718; *Miller* v. *Wilson*, 236 U. S. 373; *Bosley* v. *McLaughlin*, 236 U. S. 385.

[4] *Holden* v. *Hardy*, 169 U. S. 366; *Bunting* v. *Oregon*, 243 U. S. 426; cf. *Baltimore & Ohio R. Co.* v. *Interstate Commerce Commission*, 221 U. S. 612.

[5] *Bunting* v. *Oregon*, 243 U. S. 426.

[6] *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379.

[7] *Wilson* v. *New*, 243 U. S. 332 (wages and hours of railroad employees in an emergency); *Tagg Bros. & Moorhead* v. *United States*, 280 U. S. 420 (fees of stockyard commission men); *O'Gorman & Young* v. *Hartford Fire Insurance Co.*, 282 U. S. 251 (commissions of insurance agents); *Townsend* v. *Yeomans*, 301 U. S. 441 (fees for tobacco warehousemen).

sions, and of the minimum wage provisions as applied to women. All that is not definitely foreclosed by prior decision is the status of a general law providing for minimum wages for male employees.

It would be a work of supererogation to set forth in detail the reasons why minimum wage legislation does not transgress "whatever restrictions the vague contours of the Due Process Clause may place upon the exercise of the state's regulatory power."[8] The arguments have been powerfully marshalled in this Court's opinion in the *West Coast Hotel* case, and there is little or nothing which can be added here. That opinion, in briefest summary, points out that the wage term of a contract between employer and employee, since they often are not in a position of equality, is a fitting subject of legislative regulation to protect the interest of the state in the health and welfare of its citizens and to protect the community against an enforced "subsidy for unconscionable employers." The Court concluded that (*id.* at 398–399) "the legislature was entitled to adopt measures to reduce the evils of the 'sweating system', the exploiting of workers at wages so low as to be insufficient to meet the bare cost of living, thus making their very helplessness the occasion of a most injurious competition."

No economic or statistical material was before the Court in the *West Coast Hotel* case, but the

[8] *Railroad Commission of Texas* v. *Rowan & Nichols Oil Co.*, October Term, 1939, No. 681, decided June 3, 1940.

Court nevertheless took judicial notice of "what is of common knowledge through the length and breadth of the land" (*id.*, at 399). Inasmuch as the validity of the present statute is demonstrated by precisely the same factors, an extensive review here of economic material which proved the obvious would impose a needless burden on the Court. It should be sufficient to refer in the margin to some part of the voluminous source material which demonstrates in detail that low wages and long hours are harmful to the health and well-being of employees and their families.[9]

[9] United States Public Health Service, Public Health Bulletin No. 73, *Tuberculosis Among Industrial Workers*, pp. 16–17 (1916); *Id.*, Reprint No. 492, from Public Health Reports No. 47, Vol. 33, p. 16 (1918), *Disabling Sickness Among the Population of Seven Cotton-mill Villages of South Carolina in Relation to Family Income; Id.*, Reprint No. 1656, Public Health Reports, Vol. 49, No. 44 (1934), *The Relation between Housing and Health; Id.*, National Health Survey 1935–1936, Sickness and Medical Series, Bulletin No. 2 (1936); *Id.*, Bulletin No. 5; *Id.*, Bulletin No. 9; *Id.*, Report 1684 from Public Health Reports, Vol. 50, No. 18 (1935), *Relation of Sickness to Income and Income Change in Ten Surveyed Communities; Id.*, Public Bulletin No. 237 (1937), *Illness and Medical Care in Puerto Rico;* United States Department of Labor, Bureau of Labor Statistics, Bulletin No. 75, *Industrial Hygiene*, by George M. Kober, pp. 534–536 (1908); United States National Emergency Council, *Report on Economic Conditions of the South*, pp. 29–35 (1938); A. M. Woodbury, *Infant Mortality and its Causes* (1926); Cleveland Health Council, Howard Whipple Green, *Infant Mortality and Economic Status* (1939); Social Science Research Council, Collins and Tibbits, *Research Memorandum on Social Aspects of Health in the Depression;* National Housing Association, Pro-

In the court below appellee sought to distinguish the *West Coast Hotel* case upon three grounds. We shall discuss each asserted distinction.

1. Appellee urges that the *West Coast Hotel* case does not reach to men. Since the Washington statute involved in that case was concerned only with women, the Court's opinion does, of course,

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ceedings of the Eighth National Conference on Housing (1920), *Room Overcrowding and its Effect upon Health*, by Henry F. Vaughan, Commissioner of Health, Detroit, Michigan; Federal Council of the Churches of Christ in America, *The Family, Past and Present*, pp. 355–356 (1938) (edited by Bernhard Stern); Sen. Doc. No. 645, 61st Cong., 2nd Sess., *Report on Condition of Women and Child Wage Earners in United States* (1911), Vol. XV, p. 93; The Crime Commission of New York State, *From Truancy to Crime—A Study of 251 Adolescents* (1928); M. G. Caldwell, *The Economic Status of Families of Delinquent Boys in Wisconsin*, American Journal of Sociology, September 1931, Vol. 37, No. 2, p. 239; E. H. Sutherland, *Criminology*, p. 169 (1924); George M. Kober, *Etiology and Prophylaxis of Occupational Diseases* (taken from Diseases of Occupational and Vocational Hygiene), pp. 447–448 (1916); Josephine Goldmark, *Fatigue and Efficiency* (1912); H. Mosso, *Fatigue*, translated by Margaret and W. B. Drummond (1904); Dr. Franz Koelsch, *Arbeit und Tuberkulose*, *Archiv fur Soziale Hygiene* (1911), Vol. 1, p. 212; R. A. Spaeth, *The Problem of Fatigue*, Journal of Industrial Hygiene, p. 37, May 1919; F. S. Lee, *The Human Machine and Industrial Efficiency*, p. 45 (1918); Felix Frankfurter and Josephine Goldmark, *The Case for the Shorter Work Week* (1915), pp. 63–359; P. Sargent Florence, *Economics of Fatigue and Unrest*, p. 329 (1924); W. K. Kellogg, *Five Years under the Six-Hour Day*, p. 15 (1936). Additional material is compiled in the briefs in support of the statutes involved in *Stettler* v. *O'Hara*, 243 U. S. 629, October Term, 1916, No. 25, and *Adkins* v. *Children's Hospital*, 261 U. S. 525, October Term, 1922, No. 795.

emphasize the importance of safeguarding the health of women. But in every respect its reasoning applies equally as well to men. Indeed, it was argued in that case that the statute was invalid because it did not prescribe minimum wages for men as well as for women, that men would get the jobs denied to women by the statute, and that the statute thus discriminated against women. The Court rejected this argument on the ground that it was not essential to its validity that the law extend to all the evils "to which it might have been applied" (300 U. S., at 400).

The Supreme Court of Oklahoma, on the authority of the *West Coast Hotel* case, sustained a state law regulating the wages of men and women alike. *Associated Industries of Oklahoma* v. *Industrial Welfare Commission,* 90 P. (2d) 899.

We do not believe that it will be argued by appellee that the community has no interest in preserving the health of males. The argument would be ridiculous in the face of the great mass of health legislation, both state and federal, enacted in the interest of all citizens regardless of sex. And, if it were necessary to relate the Act to the health of women, it need only be noted that the intimate connection between the wages of men and the health and well-being of women and children is also a matter of common knowledge. Men more often than women are the sole wage earners for families, and the payment of excessively low wages to male workers is inevitably injurious to more women than is the payment of similar wages to female employees.

That the fixing of minimum wages for men does not violate the due process clause is also shown by *Bunting* v. *Oregon*, 243 U. S. 426, sustaining the validity of a maximum hour law for male workers. After the decision in the *West Coast Hotel* case, expressly disapproving the distinction made in the *Adkins* case between laws regulating maximum hours and those fixing minimum wages (300 U. S. at 395–396), the *Bunting* case is controlling here.

2. Appellee also contended in the court below that the *West Coast Hotel* case does not apply because the minimum wage prescribed unde the Fair Labor Standards Act takes no account of the value of the services rendered. We do not believe that appellee can show that Congress did not take this factor into account in determining what the statutory minimum should be. On the contrary, Congress required the industry committees specifically to consider the wages established by collective labor agreements and those paid voluntarily by employers who maintained minimum wage standards in proposing wages above the basic statutory minima (Section 8 (c)). Such amounts obviously have a relation to the value of the service rendered. The establishment of minima of twenty-five and thirty cents, below which wages could never be reduced, suggests that Congress was of the opinion that under all circumstances[10] the value of the services would equal these sums.

[10] The Act provides for wages lower than the minimum for learners, apprentices, and handicapped workers (Section 14).

In any event, the short answer to this argument is that neither the Washington statute involved in the *West Coast Hotel* case, nor the federal statute in the *Adkins* case,[11] provided that the value of services should be taken into consideration. Indeed the majority opinion in the *Adkins* case (261 U. S. 525, 557–558) and the minority in *West Coast Hotel* case (300 U. S. at 408–411), relied heavily on the failure to take this factor into account. The present case can not be distinguished from the earlier cases on this ground.

3. Appellee also seeks to distinguish the Fair Labor Standards Act from the Washington Minimum Wage Law on the ground that the federal Act itself prescribes the minimum wage, whereas the Washington statute authorized an administrative body to fix the wage in accordance with specified standards. The thought apparently is that quasi-legislative action of an administrative tribunal, if based upon a hearing, has constitutional sanctity which legislation itself does not possess.

It is a novel suggestion that the failure of Congress to delegate legislative power makes a law unconstitutional. The bill which became the Fair Labor Standards Act originally contained much more sweeping grants of power to the administration and these were narrowed because of objection

[11] Since the Court's opinion in the *West Coast Hotel* case accepts the view of the minority in the *Adkins* case and overrules that decision, it is clear that the statute involved in the latter case was also constitutional.

to the breadth of the delegation.[12] Certainly the due process clause does not compel Congress to delegate its functions to administrative bodies.

C. THE ACT IS NOT ARBITRARY BECAUSE ITS BASIC MINIMUM IS NATION-WIDE

It has been contended that the Fair Labor Standards Act is arbitrary because it establishes a uniform standard for the entire nation without differentiation because of varying conditions in diverse industries and regions.

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[12] S. 2475, 75th Cong., 1st Sess. This bill, which passed the Senate on July 31, 1937 (81 Cong. Rec. 7957), authorized an administrative body to prescribe minimum wages and maximum hours for particular employments and classes of employment in accordance with specified standards. See S. Rept. No. 884, H. Rept. No. 1452, 75th Cong., 1st Sess. After extensive criticism of this feature of the bill in debate on the floor (82 Cong. Rec. 1387, 1391, 1395–1398, 1400, 1403–1404, 1470, 1472, 1482, 1487–1493, 1497, 1812–1813, 1832), the House voted to recommit this bill on December 17, 1937 (82 Cong. Rec. 1835). At the next session the House Committee on Labor reported a revised measure which itself prescribed uniform and inflexible wages and maximum hours for all the industries subject to the Act (H. Rept. No. 2182, 75th Cong., 3d Sess.). Although this bill was criticized as too inflexible (83 Cong. Rec. 7275–7326, 7373–7448), it passed the House on May 24, 1938 (83 Cong. Rec. 7449–7450). The conference committee brought out as a compromise a bill which itself contained the basic minimum standards but provided for a certain amount of flexibility above these minima (83 Cong. Rec. 9158–9165, 9246–9266). The conference report (H. Rept. No. 2738, 75th Cong., 3d Sess.) summarizes the provisions of the Senate bill (pp. 13–20), the House bill (pp. 21–27), and the Act as passed (pp. 28–33).

In the first place, it should be noted that the Act does not prescribe the same minimum wage for all employees in all industries. It provides for the establishment of industry committees with authority to recommend wages between the basic minima of twenty-five cents and thirty cents and a maximum of forty cents for each industry; appropriate subclassification within each industry in accordance with specified standards is permitted (Section 8). Such recommendations become operative if approved by the Administrator.

Thus, it cannot be objected that the statute fails to give any consideration to varying conditions, but only that under no circumstances is the minimum permitted to be less than twenty-five cents per hour during the first year and thirty cents thereafter. Congress certainly has the power to decide for itself what amount is essential for securing the necessities of life and to make that the minimum wage. Only if it could be proved that the amount selected was so high that no rational person could regard it as suitable for the purpose for which it was chosen could this objection have any substance.

The twenty-five cents an hour minimum which applied to the year during which this case arose gave an employee, if he were to work full time, a weekly wage of eleven dollars and an annual income, if he worked for 52 weeks, of $572. Even the thirty cents required during subsequent years would amount only to $12.60 a week and $655.20 a

year. These amounts might well be criticized as being too low to achieve the purposes of the Act, but appellee is not complaining on that score. It was assumed by Congressmen supporting the bill that the minimum standards prescribed were obviously not in excess of what would be required for subsistence.[13] A comparison of the wages fixed after hearing by minimum wage boards of the states and the District of Columbia discloses that the vast majority have found that rates higher than those fixed in the Fair Labor Standards Act are essential to provide the minimum cost of living.[14] Numerous surveys and estimates by official sources and secondary authorities place the amount necessary for the mere subsistence of a family in all parts of the country at considerably more than the minimum wage established by the Fair Labor Standards Act.[15]

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[13] 82 Cong. Rec. 1472, 1505, 1797–1798; 83 Cong. Rec. 7276, 7279, 7290, 7307, 7308, 7324, 7382–7383, 7386, 9163, 9171, 9175, 9360, 6364.

[14] See United States Department of Labor, Women's Bureau Bulletin 167, *State Minimum Wage Laws and Orders: An Analysis* (1938), and Supplement (1939). Eighty-seven percent of the rates set for women in manufacturing industries exceeded the twenty-five-cent hourly minimum fixed in the federal act and seventy-two percent are thirty cents an hour or more. *Id.* (1938), p. 2.

[15] United States Department of Labor, Women's Bureau, *State Minimum Wage Budgets for Women Workers Living Alone*, November 1938 (the minimum for the maintenance of health for single women in three northeastern states and the District of Columbia, $1,094.83); Works Progress Administration, Division of Research, *Intercity Differences in*

These studies further indicate that the differences between large and small communities and different regions of the country are not nearly as great as might be anticipated.[16] If wages in a particular

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Cost of Living, 1935 (1937) (cost of basic maintenance standard of living for a family of four persons, $1,260, and emergency standard of living, $903); National Industrial Conference Board Bulletin, Vol. XII, No. 10, October 17, 1938 (average cost of living in 1938 for a family of four persons, $1,332); C. R. Daugherty, *Labor Problems in American Industry* (1938), pp. 138–145 (minimum health and decency standard in 1935 for man, wife, and two children, $1,460; minimum of subsistence level, over $730); Paul H. Douglas, *Wages and the Family* (1925) (minimum of subsistence level, $1,100–1,400; minimum health and efficiency level, $1,500–$1,800). See also Abraham Epstein, *Insecurity, a Challenge to America* (1938), pp. 97–98.

[16] *Differences between Regions.*—United States Department of Labor, Bureau of Labor Statistics, Serial No. R 963, Reprint from Monthly Labor Review, July 1939, *Differences in Living Cost in Northern and Southern Cities* (cost in five small southern cities 3.1 percent lower than in five northern cities of the same size; food prices were the same, and lower house and fuel cost in the south partially offset by higher cost of clothing, furniture and other equipment); Works Progress Administration, Division of Research, *Intercity Differences in Cost of Living* (maintenance level for a family of four in northern cities $1,285, in southern cities $1,208; emergency level in two lowest cities: $814.92 in Mobile, Alabama, and $809.64 in Wichita, Kansas; average for 59 cities $903.27); National Industrial Conference Board, *op cit.*, note 15, *supra*, pp. 86 and 90 (difference between highest in east and lowest in south, 10.2 percent); *id.*, Research Report No. 22 (1919) and Special Report No. 8 (19[illegible]) (comparison of costs in Fall River, Massachusetts, and three southern mill towns shows highest cost in the south); see, also, *id.*, *Differentials in Industrial Wages and Hours in the United States* (1938); Elizabeth Ellis Hoyt, *Consumption in our Society*

section of the country are frequently lower than the statutory minimum, it is not because the minimum is high but because the economic condition of the employees in that section are far below the subsistence level. Thus, even assuming that diverse conditions in different industries and regions might call for varying minima if the standards were high, a uniform amount fixed at a rate lower than the minimum required for subsistence in any region cannot be regarded as arbitrary or capricious.

D. THE ACT IS NOT INVALID BECAUSE OF ITS AGRICULTURAL EXEMPTIONS

Section 13 (a) (6) of the Act exempts from its operation any employee engaged in agriculture. In the court below appellee contended that this ex-

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(1938), p. 305 (maximum difference between regions in cost of living, nine percent).

Differences between Communities of Different Sizes.—The above studies also indicate that the difference in cost of living between small and large cities is not very great. United States Department of Labor, Bureau of Labor Statistics (Reprint from *Monthly Labor Review*), Serial No. R 698, p. 7, *Living Costs of Working Women in New York* (small cities slightly higher); United States Department of Labor, Women's Bureau, *State Minimum Wage Budgets for Women Workers Living Alone*, November 1938, p. 11 (in Pennsylvania small cities at most 4.3 percent less, the sole difference being in rent); Works Progress Administration, *op cit., supra*, pp. 170–171; National Industrial Conference Board Bulletin, Vol. XII, No. 10, October 17, 1938 (large cities 6.6 percent higher).

The debates show that this material was familiar to Congress, 81 Cong. Rec. 7793–7795, 7850; 82 Cong. Rec. 1499; 83 Cong. Rec. 7307–7308, 7382–7383, 9171, 9266.

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emption made the entire law unconstitutional. This argument rested almost wholly on *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540. But Connolly's case, "worn away by the erosion of time," has since been overruled and the general differences between industry and agriculture have been recognized as sufficient to warrant separate legislative classification. *Tigner* v. *Texas*, 310 U. S. 141, 147.[17] The foundation of appellee's argument has therefore been swept away.

Appellee argued in particular that the arbitrary nature of the exemption was proved by the fact that it excluded from the operation of the statute producers of naval stores.[18] It is alleged that since

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[17] See, also, *Carmichael* v. *Southern Coal & Coke Co.*, 301 U. S. 495, 509–513; *Steward Machine Co.* v. *Davis*, 301 U. S. 548, 583–585; *Aero Mayflower Transit Co.* v. *Georgia Public Service Commission*, 295 U. S. 285, each of which upheld statutes containing an exemption for agriculture. In *Fleming* v. *Hawkeye Pearl Button Co.*, 113 F. (2d) 52, 58 (C. C. A. 8th), decided June 26, 1940, the court explained the reasons for the exemption of agricultural employees from the Fair Labor Standards Act.

[18] Section 13 (6) exempts "any employee employed in agriculture." Section 3 (f) defines "agriculture" as including the "production * * * of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15 (g) of the Agricultural Marketing Act, as amended)."

Section 15 (g) of the Agricultural Marketing Act, as amended, 46 Stat. 1550, U. S. C., Tit. 12, Sec. 1141j (g), provides that—

"As used in this Act, the term 'agricultural commodity' includes, in addition to other agricultural commodities, crude gum (oleoresin) from a living tree, and the following products as processed by the original producer of the crude gum

the employees of naval stores operators and lumber manufacturers both work on pine trees, it is capricious to exempt one from the Act and not the other.

Inasmuch as appellee has not suggested that the exemption of the employees engaged in drawing gum from pine trees injures him, he is not in a position to complain of it.[19] Moreover, the power of the legislature to regulate one industry and not another has repeatedly been recognized.[20]

But in any event the hearings before the joint congressional committees on the Fair Labor Standards Act and the debate on the floor of the Senate demonstrate that Congress had before it ample evidence justifying the exemption granted. Several witnesses, including two from the Department of Agriculture, testified that in their opinion the drawing of gum from the living tree and its physical separation in a still into turpentine and rosin by the original producer were agricultural operations.[21] The statutory exemption applies only to

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(oleoresin) from which derived: Gum spirits of turpentine and gum rosin, as defined in section 92 of title 7."

[19] *Heald* v. *District of Columbia*, 259 U. S. 114, 123; *Carmichael* v. *Southern Coal & Coke Co.*, 301 U. S. 495, 513; *Virginian Ry. Co.* v. *System Federation No. 40*, 300 U. S. 515, 558; *Premier-Pabst Sales Co.* v. *Grosscup*, 298 U. S. 226, 227.

[20] *Soon Hing* v. *Crowley*, 113 U. S. 703, 708–709; *Carroll* v. *Greenwich Ins. Co.*, 199 U. S. 401, 410; *Heisler* v. *Thomas Colliery Co.*, 260 U. S. 245; *Oliver Iron Mining Co.* v. *Lord*, 262 U. S. 172, 179.

[21] See Joint Hearings before the Senate Committee on Education and Labor and the House Committee on Labor, 75th

such operations and not to other production of naval stores.[22] The record before the committees showed that the process had been specially defined as an agricultural activity by the amendment to the Agricultural Marketing Act in 1931, which is incorporated by reference in the Fair Labor Standards Act,[23] in the Agricultural Adjustment Act, as amended and administered,[24] in the Soil Conservation and Domestic Allotment Act, as administered,[25] and in the laws of Georgia, Florida, Mississippi and Alabama, which produce ninety-five percent of the gum naval stores.[26] It was not disputed that "the

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Cong., 1st Sess., on S. 2475 and H. R. 7200, *Fair Labor Standards Act of 1937*, pp. 1164–1190. See, also, 81 Cong. Rec. 7660.

The operations consist in the main of cutting a mark in the tree, attaching and collecting cups in which the gum gathers, and distilling it into turpentine and rosin by one or two men. Hearings, *supra*, at pp. 1170–1171, 1186–1187.

[22] The witness distinguished the production of gum turpentine, described above, from wood turpentine, which is obtained by taking dead wood from the forest to a processing plant for shredding and refining. The latter operation was stated to be industrial and manufacturing. *Id.*, at 1186–1189; see Wage and Hour Interpretative Bulletin No. 14, p. 4.

[23] Hearings, *supra*, note 21 at p. 1165. See note 18, *supra*, p. 114.

[24] *Id.*, at pp. 1166–1167. See in particular Section 8 (c) (2) and (6) of the Agricultural Adjustment Act, approved August 24, 1935, 49 Stat. 754–756, U. S. C., Tit. 7, Sec. 608c (2) and (6).

[25] *Id.*, at p. 1167.

[26] *Id.*, at pp. 1167–1168. The state statutes are there quoted.

sawmill people are probably manufacturers." [27] A representative of the lumber industry, appearing before the committees, did not request any general exemption but assumed that the industry was covered by the bill.[28]

With this testimony before Congress, the exemption of gum turpentine from an act which applies to the lumber industry cannot be deemed arbitrary or capricious in violation of the Fifth Amendment.

E. THE ACT IS NOT INDEFINITE

Appellee has argued that the Fair Labor Standards Act violates the due process clause because of its indefiniteness in defining the persons subjected to its terms. We find it difficult to comprehend this objection.

The Act applies to employees engaged in commerce or in the production of goods for commerce (Sections 6 and 7). "Commerce" is defined as trade, transportation, etc., among the several states or from any state to any place outside thereof, (Section 3 (b)) and "production of goods" is defined, most broadly, as working on goods in any manner (Section 3 (j)). The word "goods" is also defined (Section 3 (i)). Thus one who employs persons working on goods which are sent across state lines would know he was subject to the Act. Certainly no one in the position of appellee

[27] *Id.*, at p. 1184.

[28] *Id.*, at pp. 963–965 (testimony of Wilson Compton).

could have any doubt as to the applicability of the statute to him.

Of course, borderline cases may probably be found where there might be disagreement as to whether a person fell within the statutory definition. But obviously they do not make a law unconstitutional, or no law could stand. Cf. *Nash* v. *United States*, 229 U. S. 373.

CONCLUSION

For the above reasons it is respectfully submitted that the Fair Labor Standards Act is valid and that the judgment of the court below should be reversed.

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APPENDIX A

1. The Fair Labor Standards Act,

52 Stat. 1060, U. S. C., Title 29, Sec. 201 *et seq.*:

[S. 2475]

AN ACT To provide for the establishment of fair labor standards in employments in and affecting interstate commerce, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Fair Labor Standards Act of 1938."

FINDING AND DECLARATION OF POLICY

SEC. 2. (a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce;

and (5) interferes with the orderly and fair marketing of goods in commerce.

(b) It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.

DEFINITIONS

SEC. 3. As used in this Act—

(a) "Person" means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof.

(c) "State" means any State of the United States or the District of Columbia or any Territory or possession of the United States.

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(e) "Employee" includes any individual employed by an employer.

(f) "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the produc-

tion, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15 (g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

(g) "Employ" includes to suffer or permit to work.

(h) "Industry" means a trade, business, industry, or branch thereof, or group of industries, in which individuals are gainfully employed.

(i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

(k) "Sale" or "sell" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

(l) "Oppressive child labor" means a condition of employment under which (1) any employee under the age of sixteen years is employed by an employer (other than a parent or a person standing in place of a parent employing his own child or a child in his custody under the age of sixteen years in an occupation other than manufacturing or mining) in any occupation, or (2) any employee between the ages of sixteen and eighteen years is employed by an employer in any occupation which the Chief of the Children's Bureau in the Department of Labor shall find and by order declare to be particularly hazardous for the employment of children between such ages or detrimental to their health or well-being; but oppressive child labor shall not be deemed to exist by virtue of the employment in any occupation of any person with respect to whom the employer shall have on file an unexpired certificate issued and held pursuant to regulations of the Chief of the Children's Bureau certifying that such person is above the oppressive child-labor age. The Chief of the Children's Bureau shall provide by regulation or by order that the employment of employees between the ages of fourteen and sixteen years in occupations other than manufacturing and mining shall not be deemed to constitute oppressive child labor if and to the extent that the Chief of the Children's Bureau determines that such employment is confined to periods which will not interfere with their schooling and to conditions which will not interfere with their health and well-being.

(m) "Wage" paid to any employee includes the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees.

ADMINISTRATOR

SEC. 4. (a) There is hereby created in the Department of Labor a Wage and Hour Division which shall be under the direction of an Administrator, to be known as the Administrator of the Wage and Hour Division (in this Act referred to as the "Administrator"). The Administrator shall be appointed by the President, by and with the advice and consent of the Senate, and shall receive compensation at the rate of $10,000 a year.

(b) The Administrator may, subject to the civil-service laws, appoint such employees as he deems necessary to carry out his functions and duties under this Act and shall fix their compensation in accordance with the Classification Act of 1923, as amended. The Administrator may establish and utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may appear for and represent the Administrator in any litigation, but all such litigation shall be subject to the direction and control of the Attorney General. In the appointment, selection, classification, and promotion of officers and employees of the Administrator, no political test or qualification shall be permitted or given consideration, but all such appointments and

promotions shall be given and made on the basis of merit and efficiency.

(c) The principal office of the Administrator shall be in the District of Columbia, but he or his duly authorized representative may exercise any or all of his powers in any place,

(d) The Administrator shall submit annually in January a report to the Congress covering his activities for the preceding year and including such information, data, and recommendations for further legislation in connection with the matters covered by this Act as he may find advisable.

INDUSTRY COMMITTEES

SEC. 5. (a) The Administrator shall as soon as practicable appoint an industry committee for each industry engaged in commerce or in the production of goods for commerce.

(b) An industry committee shall be appointed by the Administrator without regard to any other provisions of law regarding the appointment and compensation of employees of the United States. It shall include a number of disinterested persons representing the public, one of whom the Administrator shall designate as chairman, a like number of persons representing employees in the industry, and a like number representing employers in the industry. In the appointment of the persons representing each group, the Administrator shall give due regard to the geographical regions in which the industry is carried on.

(c) Two-thirds of the members of an industry committee shall constitute a quorum, and the decision of the committee shall require a vote of not

less than a majority of all its members. Members of an industry committee shall receive as compensation for their services a reasonable per diem, which the Administrator shall by rules and regulations prescribe, for each day actually spent in the work of the committee, and shall in addition be reimbursed for their necessary traveling and other expenses. The Administrator shall furnish the committee with adequate legal, stenographic, clerical, and other assistance, and shall by rules and regulations prescribe the procedure to be followed by the committee.

(d) The Administrator shall submit to an industry committee from time to time such data as he may have available on the matters referred to it, and shall cause to be brought before it in connection with such matters any witnesses whom he deems material. An industry committee may summon other witnesses or call upon the Administrator to furnish additional information to aid it in its deliberations.

(e)[1] No industry committee appointed under subsection (a) of this section shall have any power to recommend the minimum rate or rates of wages to be paid under section 6 to any employees in Puerto Rico or in the Virgin Islands. Notwithstanding any other provision of this Act, the Administrator may appoint a special industry committee to recommend the minimum rate or rates of wages to be paid under section 6 to all employees in Puerto Rico or the Virgin Islands, or in Puerto Rico and

[1] This paragraph added by amendment contained in Sec. 3 of Pub. Res. 88, 76th Cong., 3d Sess., c. 432, approved June 26, 1940.

the Virgin Islands, engaged in commerce or in the production of goods for commerce, or the Administrator may appoint separate industry committees to recommend the minimum rate or rates of wages to be paid under section 6 to employees therein engaged in commerce or in the production of goods for commerce in particular industries. An industry committee appointed under this subsection shall be composed of residents of such island or islands where the employees with respect to whom such committee was appointed are employed and residents of the United States outside of Puerto Rico and the Virgin Islands. In determining the minimum rate or rates of wages to be paid, and in determining classifications, such industry committees and the Administrator shall be subject to the provisions of section 8 and no such committee shall recommend, nor shall the Administrator approve, a minimum wage rate which will give any industry in Puerto Rico or in the Virgin Islands a competitive advantage over any industry in the United States outside of Puerto Rico and the Virgin Islands.

MINIMUM WAGES

SEC. 6. (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

(1) during the first year from the effective date of this section, not less than 25 cents an hour,

(2) during the next six years from such date, not less than 30 cents an hour,

(3) after the expiration of seven years from such date, not less than 40 cents an

hour, or the rate (not less than 30 cents an hour) prescribed in the applicable order of the Administrator issued under section 8, whichever is lower, and

(4) at any time after the effective date of this section, not less than the rate (not in excess of 40 cents an hour) prescribed in the applicable order of the Administrator issued under section 8.

(5) [2] if such employee is a home worker in Puerto Rico or the Virgin Islands, not less than the minimum piece rate prescribed by regulation or order; or, if no such minimum piece rate is in effect, any piece rate adopted by such employer which shall yield, to the proportion or class of employees prescribed by regulation or order, not less than the applicable minimum hourly wage rate. Such minimum piece rates or employer piece rates shall be commensurate with, and shall be paid in lieu of, the minimum hourly wage rate applicable under the provisions of this section. The Administrator, or his authorized representative, shall have power to make such regulations or orders as are necessary or appropriate to carry out any of the provisions of this paragraph, including the power, without limiting the generality of the foregoing, to define any operation or occupation which is performed by such home work employees in Puerto Rico or the Virgin Islands; to establish minimum piece rates for any operation or occupation so defined; to prescribe the method and procedure for ascertaining and promulgating minimum piece rates; to prescribe standards for employer piece rates, including the proportion or class of employees who shall receive not less than the minimum hourly wage rate;

[2] See note 1, *supra*, p. 125.

to define the term "home worker"; and to prescribe the conditions under which employers, agents, contractors, and subcontractors shall cause goods to be produced by home workers.

(b) This section shall take effect upon the expiration of one hundred and twenty days from the date of enactment of this Act.

(c) [1] The provisions of paragraphs (1), (2), and (3) of subsection (a) of this section shall be superseded in the case of any employee in Puerto Rico or the Virgin Islands engaged in commerce or in the production of goods for commerce only for so long as and insofar as such employee is covered by a wage order issued by the Administrator pursuant to the recommendations of a special industry committee appointed pursuant to section 5 (e).

MAXIMUM HOURS

SEC. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date.

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[1] See note 1, *supra*, p. 125.

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(b) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of that specified in such subsection without paying the compensation for overtime employment prescribed therein if such employee is so employed—

(1) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that no employee shall be employed more than one thousand hours during any period of twenty-six consecutive weeks,

(2) on an annual basis in pursuance of an agreement with his employer, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that the employee shall not be employed more than two thousand hours during any period of fifty-two consecutive weeks, or

(3) for a period or periods of not more than fourteen workweeks in the aggregate in any calendar year in an industry found by the Administrator to be of a seasonal nature,

and if such employee receives compensation for employment in excess of 12 hours in any workday, or

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for employment in excess of 56 hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed.

(c) In the case of an employer engaged in the first processing of milk, whey, skimmed milk, or cream into dairy products, or in the ginning and compressing of cotton, or in the processing of cottonseed, or in the processing of sugar beets, sugarbeet molasses, sugarcane, or maple sap, into sugar (but not refined sugar) or into syrup, the provisions of subsection (a) shall not apply to his employees in any place of employment where he is so engaged; and in the case of an employer engaged in the first processing of, or in canning or packing, perishable or seasonal fresh fruits or vegetables, or in the first processing, within the area of production (as defined by the Administrator), of any agricultural or horticultural commodity during seasonal operations, or in handling, slaughtering, or dressing poultry or livestock, the provisions of subsection (a), during a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, shall not apply to his employees in any place of employment where he is so engaged.

(d) This section shall take effect upon the expiration of one hundred and twenty days from the date of enactment of this Act.

WAGE ORDERS

SEC. 8. (a) With a view to carrying out the policy of this Act by reaching, as rapidly as is economically feasible without substantially curtailing employment, the objective of a universal minimum

wage of 40 cents an hour in each industry engaged in commerce or in the production of goods for commerce, the Administrator shall from time to time convene the industry committee for each such industry, and the industry committee shall from time to time recommend the minimum rate or rates of wages to be paid under section 6 by employers engaged in commerce or in the production of goods for commerce in such industry or classifications therein.

(b) Upon the convening of an industry committee, the Administrator shall refer to it the question of the minimum wage rate or rates to be fixed for such industry. The industry committee shall investigate conditions in the industry and the committee, or any authorized subcommittee thereof, may hear such witnesses and receive such evidence as may be necessary or appropriate to enable the committee to perform its duties and functions under this Act. The committee shall recommend to the Administrator the highest minimum wage rates for the industry which it determines, having due regard to economic and competitive conditions, will not substantially curtail employment in the industry.

(c) The industry committee for any industry shall recommend such reasonable classifications within any industry as it determines to be necessary for the purpose of fixing for each classification within such industry the highest minimum wage rate (not in excess of 40 cents an hour) which (1) will not substantially curtail employment in such classification and (2) will not give a competitive advantage to any group in the industry, and shall recommend for each classification in the in-

dustry the highest minimum wage rate which the committee determines will not substantially curtail employment in such classification. In determining whether such classifications should be made in any industry, in making such classifications, and in determining the minimum wage rates for such classifications, no classification shall be made, and no minimum wage rate shall be fixed, solely on a regional basis, but the industry committee and the Administrator shall consider among other relevant factors the following:

(1) competitive conditions as affected by transportation, living, and production costs;

(2) the wages established for work of like or comparable character by collective labor agreements negotiated between employers and employees by representatives of their own choosing; and

(3) the wages paid for work of like or comparable character by employers who voluntarily maintain minimum-wage standards in the industry.

No classification shall be made under this section on the basis of age or sex.

(d) The industry committee shall file with the Administrator a report containing its recommendations with respect to the matters referred to it. Upon the filing of such report, the Administrator, after due notice to interested persons, and giving them an opportunity to be heard, shall by order approve and carry into effect the recommendations contained in such report, if he finds that the recommendations are made in accordance with law, are supported by the evidence adduced at the hearing, and, taking into consideration the same factors as are required to be considered by the industry com-

mittee, will carry out the purposes of this section; otherwise he shall disapprove such recommendations. If the Administrator disapproves such recommendations, he shall again refer the matter to such committee, or to another industry committee for such industry (which he may appoint for such purpose), for further consideration and recommendations.

(e) No order issued under this section with respect to any industry prior to the expiration of seven years from the effective date of section 6 shall remain in effect after such expiration, and no order shall be issued under this section with respect to any industry on or after such expiration, unless the industry committee by a preponderance of the evidence before it recommends, and the Administrator by a preponderance of the evidence adduced at the hearing finds, that the continued effectiveness or the issuance of the order, as the case may be, is necessary in order to prevent substantial curtailment or employment in the industry.

(f) Orders issued under this section shall define the industries and classifications therein to which they are to apply, and shall contain such terms and conditions as the Administrator finds necessary to carry out the purposes of such orders, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rates established therein. No such order shall take effect until after due notice is given of the issuance thereof by publication in the Federal Register and by such other means as the Administrator deems reasonably calculated to give to interested persons general notice of such issuance.

(g) Due notice of any hearing provided for in this section shall be given by publication in the Federal Register and by such other means as the Administrator deems reasonably calculated to give general notice to interested persons.

ATTENDANCE OF WITNESSES

SEC. 9. For the purpose of any hearing or investigation provided for in this Act, the provisions of sections 9 and 10 (relating to the attendance of witnesses and the production of books, papers, and documents) of the Federal Trade Commission Act of September 16, 1914, as amended (U. S. C., 1934 edition, title 15, secs. 49 and 50), are hereby made applicable to the jurisdiction, powers, and duties of the Administrator, the Chief of the Children's Bureau, and the industry committees.

COURT REVIEW

SEC. 10. (a) Any person aggrieved by an order of the Administrator issued under section 8 may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Administrator be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon the Administrator, and thereupon the Administrator shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon

the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part, so far as it is applicable to the petitioner. The review by the court shall be limited to questions of law, and findings of fact by the Administrator when supported by substantial evidence shall be conclusive. No objection to the order of the Administrator shall be considered by the court unless such objection shall have been urged before the Administrator or unless there were reasonable grounds for failure so to do. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence may materially affect the result of the proceeding and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence to be taken before the Administrator and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Administrator may modify his findings by reason of the additional evidence so taken, and shall file with the court such modified or new findings which if supported by substantial evidence shall be conclusive, and shall also file his recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(b). The commencement of proceedings under subsection (a) shall not, unless specifically ordered by the court, operate as a stay of the Administrator's order. The court shall not grant any stay of the order unless the person complaining of such order shall file in court an undertaking with a surety or surities satisfactory to the court for the payment to the employees affected by the order, in the event such order is affirmed, of the amount by which the compensation such employees are entitled to receive under the order exceeds the compensation they actually receive while such stay is in effect.

INVESTIGATIONS, INSPECTIONS, AND RECORDS

SEC. 11. (a) The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subect to this Act, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act. Except as provided in section 12 and in subsection (b) of this section, the Administrator shall utilize the bureaus and divisions of the Department of Labor for all the investigations and inspections necessary under this section. Except as provided in section 12, the Administrator shall bring all actions under section 17 to restrain violations of this Act.

(b) With the consent and cooperation of State agencies charged with the administration of State labor laws, the Administrator and the Chief of the Children's Bureau may, for the purpose of carrying out their respective functions and duties under this Act, utilize the services of State and local agencies and their employees and, notwithstanding any other provision of law, may reimburse such State and local agencies and their employees for services rendered for such purposes.

(c) Every employer subject to any provision of this Act or of any order issued under this Act shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this Act or the regulations or orders thereunder.

CHILD LABOR PROVISIONS

SEC. 12. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, no producer, manufacturer, or dealer shall ship or deliver for shipment in commerce any goods produced in an establishment situated in the United States in or about which within thirty days prior to the removal of such goods therefrom any oppressive child labor has been employed: *Provided,* That a prosecution and conviction of a defendant for the shipment or delivery for shipment of any goods under the conditions herein prohibited

shall be a bar to any further prosecution against the same defendant for shipments or deliveries for shipment of any such goods before the beginning of said prosecution.

(b) The Chief of the Children's Bureau in the Department of Labor, or any of his authorized representatives, shall make all investigations and inspections under section 11 (a) with respect to the employment of minors, and, subject to the direction and control of the Attorney General, shall bring all actions under section 17 to enjoin any act or practice which is unlawful by reason of the existence of oppressive child labor, and shall administer all other provisions of this Act relating to oppressive child labor.

EXEMPTIONS

SEC. 13. (a) The provisions of sections 6 and 7 shall not apply with respect to (1) any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the Administrator); or (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce; or (3) any employee employed as a seaman; or (4) any employee of a carrier by air subject to the provisions of title II of the Railway Labor Act; or (5) any employee employed in the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animals and vegetable life, including the going to and return-

ing from work and including employment in the loading, unloading, or packing of such products for shipment or in propagating, processing, marketing, freezing, canning, curing, storing, or distributing the above products or byproducts thereof; or (6) any employee employed in agriculture; or (7) any employee to the extent that such employee is exempted by regulations or orders of the Administrator issued under section 14; or (8) any employee employed in connection with the publication of any weekly or semiweekly newspaper with a circulation of less than three thousand the major part of which circulation is within the county where printed and published; or (9) any employee of a street, suburban, or interurban electric railway, or local trolley or motorbus carrier, not included in other exemptions contained in this section; or (10) to any individual employed within the area of production (as defined by the Administrator), engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products, or (11)[4] any switchboard operator employed in a public telephone exchange which has less than five hundred stations.

(b) The provisions of section 7 shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of sec-

[4] This clause added by amendment of August 9, 1939, 53 Stat. 1266.

tion 204 of the Motor Carrier Act, 1935; or (2) any employee of an employer subject to the provisions of Part I of the Interstate Commerce Act.

(c) The provisions of section 12 relating to child labor shall not apply with respect to any employee employed in agriculture while not legally required to attend school, or to any child employed as an actor in motion pictures or theatrical productions.

LEARNERS, APPRENTICES, AND HANDICAPPED WORKERS

SEC. 14. The Administrator, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by regulations or by orders provide for (1) the employment of learners, of apprentices, and of messengers employed exclusively in delivering letters and messages, under special certificates issued pursuant to regulations of the Administrator, at such wages lower than the minimum wage applicable under section 6 and subject to such limitations as to time, number, proportion, and length of service as the Administrator shall prescribe, and (2) the employment of individuals whose earning capacity is impaired by age or physical or mental deficiency or injury, under special certificates issued by the Administrator, at such wages lower than the minimum wage applicable under section 6 and for such period as shall be fixed in such certificates.

PROHIBITED ACTS

SEC. 15. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person—

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 6 or section 7, or in violation of any regulation or order of the Administrator issued under section 14; except that no provision of this Act shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this Act shall excuse any common carrier from its obligation to accept any goods for transportation;

(2) to violate any of the provisions of section 6 or section 7, or any of the provisions of any regulation or order of the Administrator issued under section 14;

(3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee;

(4) to violate any of the provisions of section 12;

(5) to violate any of the provisions of section 11 (c), or to make any statement, report, or record filed or kept pursuant to the provisions of such section or of any regulation or order thereunder, knowing such statement, report, or record to be false in a material respect.

(b) For the purposes of subsection (a) (1) proof that any employee was employed in any place of

employment where goods shipped or sold in commerce were produced, within ninety days prior to the removal of the goods from such place of employment, shall be prima facie evidence that such employee was engaged in the production of such goods.

PENALTIES

SEC. 16. (a) Any person who willfully violates any of the provisions of section 15 shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

(b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

INJUNCTION PROCEEDINGS

SEC. 17. The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 20 (relating to notice to opposite party) of the Act entitled "An Act to supplement existing laws against unlawful restaints and monopolies, and for other purposes", approved October 15, 1914, as amended (U. S. C., 1934 edition, title 28, sec. 381), to restrain violations of section 15.

RELATION TO OTHER LAWS

SEC. 18. No provision of this Act or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this Act or a maximum workweek lower than the maximum workweek established under this Act, and no provision of this Act relating to the employment of child labor shall justify noncompliance with any Federal or State law or municipal ordinance establishing a higher standard than the standard established under this Act. No provision of this Act shall justify any employer in reducing a wage paid by him which is in excess of the applicable minimum wage under this Act, or justify any employer in increasing hours of employment maintained by him which are shorter than the maximum hours applicable under this Act.

SEPARABILITY OF PROVISIONS

SEC. 19. If any provision of this Act or the application of such provision to any person or circumstance is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby.

Approved, June 25, 1938.

2. THE PERTINENT REGULATIONS

Title 29, Chapter V, Code of Federal Regulations, Part 516

UNITED STATES DEPARTMENT OF LABOR, WAGE AND HOUR DIVISION

Regulations on records to be kept by employers pursuant to Section 11 (c) of the Fair Labor Standards Act of 1938; approved Oct. 21, 1938; published in Fed. Reg. Oct. 22, 1938

SECTION 516.1—RECORDS REQUIRED.—Every employer subject to any provisions of the Fair Labor Standards Act or any order issued under this Act shall make and preserve records containing the following information with respect to each person employed by him, with the exception of those specified in sections 13 (a) (3), 13 (a) (4), 13 (a) (5), 13 (a) (6), 13 (a) (8), 13 (a) (9), and 13 (a) (10) of the Act:

(a) Name in full.
(b) Home address.
(c) Date of birth if under 19.
(d) Hours worked each workday and each workweek.
(e) Regular rate of pay and basis upon which wages are paid.

(f) Wages at regular rate of pay for each workweek, excluding extra compensation attributable to the excess of the overtime rate over the regular rate.

(g) Extra wages for each workweek attributable to the excess of the overtime rate over the regular rate.

(h) Additions to cash wages at cost, or deductions from stipulated wages in the amount deducted or at the cost of the item for which deduction is made, whichever is less.

(i) Total wages paid for each workweek.

(j) Date of payment.

Provided; however, That with respect to employees specified in section 13 (b) of the Act, records referred to in paragraphs (f) and (g) of this section shall not be required; and

Provided further, That with respect to employees who are specified in section 13 (a) (2) of the Act and employees who are defined in regulations of the Wage and Hour Division: Part 541 (Regulations defining and delimiting the terms "any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman" pursuant to sec. 13 (a) (1) of the Fair Labor Standards Act)—employers need make and preserve records containing the following information only:

(a) Name in full.

(b) Home address.

(c) Occupations.

Provided further, That with respect to employees employed or purported to be employed by

an employer in pursuance of the provisions of section 7 (b) (1) or section 7 (b) (2) of the Fair Labor Standards Act, employers shall comply with each of the following additional requirements:

(a) Keep and preserve a copy of each collective bargaining agreement which entitles or purports to entitle an employer to employ any of his employees in pursuance of the provisions of section 7 (b) (1) or section 7 (b) (2) of the Fair Labor Standards Act.

(b) Report and file with the Administrator at Washington, D. C., within thirty days after such collective bargaining agreement has been made, a copy of each such collective bargaining agreement. Likewise, a copy of each amendment or addition thereto shall be reported and filed with the Administrator at Washington, D. C., within thirty days after such amendment or addition has been agreed upon. If any such collective bargaining agreement, or amendment or addition thereto, was made prior to the 25th day of April 1939, a copy thereof shall be reported and filed with the Administrator at Washington, D. C., on or before the 26th day of May 1939. The reporting and filing of any collective bargaining agreement or amendment or addition thereto shall not be construed to mean that such collective bargaining agreement or amendment or addition thereto is a collective bargaining agreement within the meaning of the provisions of Section 7 (b) (1) or Section 7 (b) (2).

(c) Make and preserve a record designating each employee employed pursuant to each such collective bargaining agreement and each amendment and addition thereto.

Provided further, That with respect to employees employed in occupations in the performance of which the employee receives tips or gratuities from third persons which are accounted for or turned over by the employee to the employer, additional records containing the following information with respect to each such employee shall be made and preserved by the employer:

(a) Total hours worked each workweek in occupations in the performance of which the employee receives tips or gratuities from third persons.

(b) Total hours worked each workweek in any other occupation.

(c) Wages paid each workweek for hours worked under (a) above; *provided, however,* that if the employer claims as "wages paid" the amount of any gratuities or tips voluntarily paid to the employee by third persons and accounted for or turned over by the employee to the employer, such amounts must be recorded in a separate column from that in which any other compensation is recorded.

(d) Wages paid each workweek for hours worked under (b) above; *provided, however,* that if the employer claims as "wages paid" the amount of any gratuities or tips voluntarily paid to the employee by third persons and accounted for or turned over by the employee to the employer, such amounts must be recorded in a separate column from that in which any other compensation is recorded.

(This section, as amended, approved by the Administrator October 13, 1939, and published in the Federal Register October 14, 1939.)

SEC. 516.2.—FORM OF RECORDS.

No particular order or form is prescribed for these records, provided that the information required in section 516.1 is easily obtainable for inspection purposes.

SEC. 516.3.—PLACE AND PERIOD FOR KEEPING RECORDS.

Each employer shall keep the records required by these regulations for his employees within each State either at the place or places of employment or, where that is impracticable, in or about at least one of his places of business within such State, unless otherwise authorized by the Administrator. Such records shall be kept safe and readily accessible for a period of at least 4 years after the entry of the record, and such records shall be open to inspection and transcription by the Administrator or his duly authorized and designated representative at any time.

SECTION 516.4.—DEFINITIONS OF TERMS USED IN THESE REGULATIONS.

(a) *Act.*—The "Act" means the Fair Labor Standards Act of 1938.

(b) *Hours worked.*—For the purpose of these regulations the term "hours worked" shall include all time during which an employee is required by his employer to be on duty or to be on the employer's premises or to be at a prescribed workplace.

(c) *Workday and workweek.*—For the purposes of these regulations, a "workday" with respect to any employee shall be any 24 consecutive hours, and a "workweek" with respect to any employee shall be 7 consecutive days, provided that the workday

of workweek is not changed for the purpose of evasion of provisions of the Act or any regulations prescribed pursuant thereto.

(d) *Wage or wages.*—For the purposes of these regulations, the term "wage" or "wages" means all remuneration for employment of whatsover nature whether paid on time work, piece work, salary, commission, bonus, or other basis.

(e) *Employee.*—The term "employee" is defined by the Act (sec. 3 (e)) to include "any individual employed by an employer," and the term "employ" is defined by the Act (sec. 3 (g)) to include "to suffer or permit to work." It shall be the duty of each employer to make and preserve all records required under these regulations with respect to each employee employed by him, whether or not such employees perform their work in an establishment or plant operated by the employer or subject to his immediate supervision. Thus, the required records shall be made and preserved by the employer for "industrial home workers" or other employees who produce goods for the employer from material furnished by home or who are compensated for such employment at piece rates, wherever such employees actually perform their work.

(f) *Regular rate of pay.*—For the purpose of these regulations, the term "regular rate of pay" means—

(i) With respect to an employee paid solely on an hourly basis (i. e., receiving no additional wage whatever): the hourly wage rate at which he is employed.

(ii) With respect to an employee employed on a daily, weekly, semimonthly, or monthly basis for a regular number of hours

per week determined by agreement or custom: the average hourly rate obtained by dividing the wages earned for that regular number of hours in the workweek by that regular number of hours; and

(iii) With respect to an employee paid on any other basis than those specified in (i) and (ii) of this Paragraph (f): the average hourly rate obtained by dividing the wages earned for the particular workweek by the total number of hours worked during that workweek.

SECTION 516.5.—PETITION FOR AMENDMENT OF REGULATION.

Any person wishing a revision of any of the terms of the foregoing regulations on records to be kept by employers (secs. 516.1 through 516.4) may submit in writing to the Administrator a petition setting forth the changes desired and the reasons for proposing them. If upon inspection of the petition the Administrator believes that reasonable cause for amendment of the regulations is set forth, the Administrator will either schedule a hearing with due notice to interested parties, or will make other provisions for affording interested parties an opportunity to present their views, both in support and in opposition to the proposed changes.

APPENDIX B

TABLE 1.—*Major causes of strikes, 1881–1905; 1914–1926, and annually 1927 to 1939*[1]

Year or period	Number of strikes[2]					Percent of total			
	Strikes in which wages or hours were an issue				Strikes in which wages or hours were not an issue[3] (includes recognition and other issues)	Strikes in which wages or hours were an issue			Strikes in which wages or hours were not an issue[3] (includes recognition and other issues)
	Total strikes	Wages or hours the sole issue[4]	Wages and hours combined with other issues, including recognition[5]	Total strikes in which wages or hours were an issue		Wages or hours the sole issue[4]	Wages and hours combined with other issues, including recognition[5]	Total strikes in which wages or hours were an issue	
1881–1905	38,303	20,660	1,527	22,187	16,116	54.00	4.00	58.00	42.00
1914–1926	20,388	14,545	2,492	17,037	9,351	55.12	9.44	64.56	35.44
1927	666	273	38	311	355	40.99	5.71	46.70	53.30
1928	620	222	48	270	350	35.81	7.74	43.55	56.45
1929	924	373	95	468	456	40.37	10.28	50.65	49.35
1930	651	284	36	320	331	43.63	5.53	49.16	50.84
1931	796	447	53	500	296	56.16	6.66	62.82	37.18
1932	852	560	50	610	242	65.73	5.87	71.60	28.40
1933	1,673	926	227	1,153	519	55.38	13.58	68.96	31.04

[1] U. S. Department of Labor, Bureau of Labor Statistics, *Strikes in the United States, 1880–1936*. Bulletin No. 651 (1937). Computed from table 8, p. 33 and table 28, pp. 61–62.

[2] Includes both strikes and lockouts.

[3] Includes only strikes the major causes of which were classified as "wages and hours."

[4] Includes only strikes the major causes of which were classified as "recognition and wages," "recognition and hours," and "recognition, wages, and hours."

[5] Includes only strikes the major causes of which were classified as "recognition," "closed shop," "discrimination," "other organization issues," "sympathy," "rival unions or factions," "jurisdiction," "other," and "not reported."

TABLE 1.—*Major causes of strikes, 1881–1905; 1914–1926, and annually 1927 to 1939*—Continued

Year or period	Number of strikes					Percent of total			
	Strikes in which wages or hours were an issue				Strikes in which wages or hours were not an issue (includes recognition and other issues)	Strikes in which wages or hours were an issue			Strikes in which wages or hours were not an issue (includes recognition and other issues)
	Total strikes	Wages or hours the sole issue	Wages and hours combined with other issues, including recognition	Total strikes in which wages or hours were an issue		Wages or hours the sole issue	Wages and hours combined with other issues, including recognition	Total strikes in which wages or hours were an issue	
1934	1,817	717	326	1,043	774	39.46	17.94	57.40	42.60
1935	2,003	760	369	1,129	874	37.94	18.42	56.36	43.64
1936	2,156	756	656	1,392	764	35.06	29.50	64.56	35.44
1937 [1]	4,720	1,410	1,747	3,157	1,563	29.87	37.01	66.88	33.12
1938 [2]	2,772	776	590	1,366	1,406	28.00	21.28	49.30	50.72
1st six months of 1939 [3]	1,120	314	214	528	592	28.03	19.10	47.14	52.85
1927–1939	20,769	7,818	4,429	12,247	8,522	37.64	21.32	58.96	41.03
Total, 1881–1939	85,460	43,023	8,448	51,471	33,989	50.34	9.88	60.22	39.77

[1] U. S. Department of Labor, Bureau of Labor Statistics, *Analysis of Strikes in 1937* (1938). Computed from table 10, p. 15.

[2] U. S. Department of Labor, *Monthly Labor Review*, May 1939, p. 1125.

[3] U. S. Department of Labor, *Monthly Labor Review*, May 1939, p. 1136; June 1939, p. 1344; July 1939, p. 155; August 1939, p. 395; September 1939, p. 657; October 1939, p. 902.

TABLE 2.—*Number of workers involved in strikes, 1881–1905, and annually 1927 to 1939* [1]

Year or period	Number of workers involved [2]					Percent of total			
	Strikes in which wages or hours were an issue				Strikes in which wages or hours were not an issue [3] (includes recognition and other issues)	Strikes in which wages or hours were an issue			Strikes in which wages or hours were not an issue [5] (includes recognition and other issues)
	Total number of workers involved	Wages or hours the sole issue [3]	Wages and hours combined with other issues, including recognition [4]	Total strikes in which wages or hours were an issue		Wages or hours the sole issue [3]	Wages and hours combined with other issues, including recognition [4]	Total strikes in which wages or hours were an issue	
1881–1905	9,529,434	5,901,390	854,544	6,755,943	2,773,491	61.92	8.97	70.90	29.10
1927	319,442	232,217	12,620	244,837	74,605	72.60	3.95	76.65	23.35
1928	322,866	139,913	29,206	169,119	153,747	43.33	9.05	52.38	47.62
1929	286,163	104,059	53,945	158,004	128,159	36.36	18.85	55.21	44.79
1930	181,901	73,223	47,929	121,152	60,749	40.25	26.35	66.60	33.40
1931	345,689	155,308	60,217	215,525	130,144	44.93	17.42	62.35	37.65
1932	324,960	234,158	64,845	299,003	25,957	72.06	19.95	92.01	7.99
1933	1,143,910	544,084	267,362	811,446	332,464	47.57	23.37	70.94	29.06
1934	1,480,343	346,174	589,917	936,091	544,252	23.38	39.85	63.23	36.77
1935	1,101,902	662,530	164,172	826,711	275,191	60.13	14.90	75.03	24.97
1936	709,748	250,672	224,666	475,338	234,410	35.32	31.65	66.97	33.03
1937 [6]	1,945,748	435,568	590,026	1,025,654	920,094	22.30	30.33	52.72	47.28

[1] U. S. Department of Labor, Bureau of Labor Statistics, *Strikes in the United States, 1880–1936*. Bulletin No. 651, 1937. Computed from table 9, p. 54 and table 26, p. 62.

[2] No figures are available for the period 1914–1926.

[3] Includes only strikes the major causes of which were classified as "wages and hours."

[4] Includes only strikes the major causes of which were classified as "recognition and wages," "recognition and hours," and "recognition, wages and hours."

[5] Includes only strikes the major causes of which were classified as "recognition," "closed shop," "discrimination," "other organization issues," "sympathy," "rival unions or factions," "jurisdiction," "other," and "not reported."

[6] U. S. Department of Labor, Bureau of Labor Statistics, *Analysis of Strikes in 1937*, 1938. Computed from table 10, p. 15.

TABLE 2.—*Number of workers involved in strikes, 1881–1905, and annually 1925–1939*—Continued

Year or period	Number of workers involved					Percent of total			
	Strikes in which wages or hours were an issue				Strikes in which wages or hours were not an issue (includes recognition and other issues)	Strikes in which wages or hours were an issue			Strikes in which wages or hours were not an issue (includes recognition and other issues)
	Total number of workers involved	Wages or hours the sole issue	Wages and hours combined with other issues, including recognition	Total strikes in which wages or hours were an issue		Wages or hours the sole issue	Wages and hours combined with other issues, including recognition	Total strikes in which wages or hours were an issue	
1938 [1]	667,629	252,166	85,538	337,704	349,925	35.67	12.44	49.11	50.89
First six months of 1939 [2]	680,849	114,319	46,147	160,466	520,383	16.72	6.78	23.57	76.45
Total, 1927–1939	9,531,130	3,544,400	2,236,650	5,781,050	3,750,080	37.19	23.46	60.65	39.35

[1] U. S. Department of Labor, *Monthly Labor Review*, May 1939, p. 1125.

[2] U. S. Department of Labor, *Monthly Labor Review*, May 1939, p. 1136; June 1939, p. 1344; July 1939, p. 155; August 1939, p. 395; September 1939, p. 687; October 1939, p. 902.

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